

(26,425)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 958.

FRANK P. McCLOSKEY, PLAINTIFF IN ERROR,

vs.

JOHN W. TOBIN, SHERIFF OF BEXAR COUNTY, TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE
OF TEXAS.

INDEX.

	Original.	Print
Caption	0	1
Petition for writ of <i>habeas corpus</i>	1	1
Exhibit A—Warrant and return.....	4	3
B—Information by Dupree.....	5	4
C—Information by Newton.....	8	6
Petition for writ of <i>habeas corpus</i>	10	8
Exhibit A—Warrant and return.....	13	10
B—Information by Dupree.....	14	11
C—Information by Newton.....	17	12
Return of respondent.....	20	14
Agreed statement of facts.....	21	15
Judgment of the Court of Criminal Appeals.....	22	16
Opinion of the Court of Criminal Appeals.....	23	16
Motion for rehearing.....	32	23
Order on motion for rehearing.....	54	37
Opinion on motion for rehearing.....	55	37
Petition for allowance of writ of error and allowance.....	63	42
Bond on writ of error.....	65	43
Order allowing writ of error.....	67	45
Writ of error.....	68	45
Citation and service.....	70	46
Assignments of errors.....	71	47
Clerk's certificate	73	48

T
A

Ju

Pa
Te

1

To

re

Joh
is a
Sh
cer
Be
cas
Clo
ma
ma

(
inf
the
bein
Act
the
form
atto
oth
in
tha
aver

Caption.

THE STATE OF TEXAS:

At a Term of the Honorable Court of Criminal Appeals of the State of Texas Begun and Holden Within and for the State of Texas, at Austin and Convening on the First Day of October, A. D. 1917, and Which is Still in Session.

Present: Honorable W. L. Davidson, Presiding Judge, and Judges A. C. Prendergast and W. C. Morrow.

The following proceedings on appeal were had in the cause of Ex Parte Frank P. McCloskey, No. 4773, Appeal from Bexar County, Texas, to-wit:

No. —.

Ex Parte FRANK P. McCLOSKEY.

To the Honorable Court of Criminal Appeals of the State of Texas, October Term, A. D. 1917:

Your petitioner, Frank P. McCloskey, of said county and State, respectfully represents:

(1) That he is illegally restrained of his liberty, and confined by John W. Tobin, Sheriff of Bexar County, Texas; that your petitioner is so restrained of his liberty and confined by said John W. Tobin, Sheriff, by virtue of a certain capias issued upon and by virtue of a certain complaint and information filed in the County Court of Bexar County, for criminal cases in Bexar County, Texas, and which case is entitled: "No. 13394, The State of Texas vs. Frank P. McCloskey;" a copy of said capias, and said complaint and said information are hereunto annexed to this petition, and the same are marked respectively, Exhibits A, B and C.

(2) Your petitioner further represents that in said complaint and information, he is charged with the violation of an Act passed at the regular session of the 35th Legislature of the State of Texas, and being Chapter 133, approved March 29, A. D. 1917, and which Act is entitled; "An Act to amend Article 421 of the Penal Code of the State of Texas, to further define barratry, so as to include the fomenting of litigation for profit, and by persons in addition to attorneys at law, by soliciting employment or advancing money or other thing of value to claimants, or to the parties to the litigations in order to procure employment"; that said information charges that your petitioner was not an attorney at law; your petitioner avers that said Act of the Legislature aforesaid, is wholly inopera-

tive and void, insofar as the same relates to persons who are not attorneys at law, in that said provisions of said law are so indefinitely framed, and are of such doubtful construction, so that the same cannot be understood, either from the language in which such provisions are expressed, or from some other written law of the State as is provided by Article 6 of the Penal Code of the State of Texas.

2 (3) Claims for personal injuries, as are all other claims, debts and choses of action, under the Constitution of the State and of the United States and the law, are property, and as such are subject to barter and sale, and are assignable; that the right to purchase all such claims, and the right to solicit the purchase of such claims, and the right to seek employment, either as to the purchase of such claims or their collection or adjustment, is a lawful transaction and business, and such that all persons have a right to engage in; that said Act of the Legislature, insofar as it attempts to make penal such transaction, is absolutely null and void, in that the same is in violation of Section 3 of Article 1 of the Constitution of the State of Texas; that said statute is also in conflict with Section 19 of Article 1 of the Constitution of Texas.

(4) Your petitioner further avers that said statute is, also, null and void by reason of being in conflict with Section 1 of the 14th Amendment to the Constitution of the United States, which reads as follows:

"Article XIV.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the law."

That said statute violates the said Article of the Constitution of the United States, in that the same is class-legislation for the reason that said statute relates only to claims or debts and permits the adjustment of all other personal property, save and except claims and debts; that said statute denies and prohibits persons from engaging in a lawful business and denies to persons and particularly this petitioner the equal protection of the law.

3 (5) Your petitioner further avers that, for and on account of each and all of the above and foregoing reasons, that said statute of the State of Texas, is unconstitutional, null and void, and that by reason thereof, your petitioner, as aforesaid, is unlawfully restrained of his liberty by the Sheriff of Bexar County, Texas, for an alleged violation of said statute.

(6) Your petitioner further avers that he presented his application for a writ of habeas corpus to the Honorable Nelson Lytle, Judge of the County Court of Bexar County, for Criminal Cases, but that said Judge refused to grant said writ and endorsed on petitioner's application for the writ the following statement:

THE STATE OF TEXAS,
County of Bexar:

The within application for a writ of habeas corpus was presented to me, this the 4th day of October, 1917, but on account of the public importance of the questions raised by the application for the writ of habeas corpus, and the fact that my decision would not be an authoritative and final construction of the statute involved, I hereby decline to grant the application for the writ of habeas corpus as prayed for.

(Signed)

NELSON LYTLE,
Judge of the County Court of Bexar
County for Criminal Cases."

All of which more particularly appears by petitioner's said application for a writ of habeas corpus, and the order of the judge of the County Court refusing the same, hereto attached to this petition and made a part of the same.

Premises considered, your petitioner prays your Honors to grant and issue a writ of habeas corpus, commanding the said John W. Tobin, Sheriff of said Bexar County, to bring your petitioner before Your Honors at such time and place as you may designate, in order that the cause of his restraint and confinement may be inquired into; and, upon a hearing of the same by this honorable court, he prays that he may be discharged from his illegal restraint and confinement; and, pending the hearing of this application, he prays that he may be admitted to bail in such sum as this honorable court may fix.

WARD AND BICKETT,
Attorneys for Petitioner.

THE STATE OF TEXAS,
County of Bexar:

I, Frank P. McCloskey, being duly sworn, upon my oath say that the allegations in the above petition are true according to my belief.

FRANK P. McCLOSKEY.

Subscribed and sworn to before me, by said Frank P. McCloskey, on this, the 4th day of October. A. D. 1917.

[SEAL.]

S. C. GARDNER,
Notary Public, Bexar County, Texas.

"EXHIBIT A."

THE STATE OF TEXAS,
County of Bexar:

To my Sheriff of the State of Texas, Greeting:

You are hereby commanded to arrest Frank P. McCloskey and him safely keep, so that you have him before the Honorable County

Court of Bexar County, Texas, for Criminal Cases at the Court House, in San Antonio, Instantly, then and there to answer the State of Texas upon a charge by information pending in said Court wherein said defendant is charged with the offense of barratry.

Herein fail not, but of this writ make due return Instantly, showing how you have executed the same.

Witness my signature and official seal at office in San Antonio, this 4th day of October A. D. 1917.

[SEAL.]

FRANK R. NEWTON,
Clerk County Court Bexar County,
Texas, for Criminal Cases,
By T. W. MASSEY, Deputy.

Issued 4th day of October, A. D. 1917.

Sheriff's Return.

Came to hand the 4th day of October, A. D. 1917, and executed on the 4th day of October, A. D. 1917, by arresting the within named Frank P. McCloskey and taking him into custody.

Sheriff Bexar County, Texas,
By _____, Deputy.

Fees:

Making Arrest —.
Mileage —.
Taking Bond —.
Commitment —.

Total \$—.

5 No. —. The State of Texas vs. Frank P. McCloskey. Capias. Filed this — day of —, A. D. 19—. Frank R. Newton, Clerk County Court, Bexar County, Texas, for Criminal Cases by — — Deputy.

"EXHIBIT B."

In the name and by the authority of the State of Texas.

Before me, the undersigned authority, on this day personally appeared L. S. Dupree, who, after being by me duly sworn, on oath, deposes and says that he, the affiant, has good reason to believe and does believe, and therefore states and charges, that on the 23rd day of September, A. D. 1917, one Gus Rote and one B. Richardson, were traveling and riding in Bexar County, Texas, upon a public road in said county, in two different automobiles, which were going in opposite directions; that through the carelessness and negligence of the said Gus Rote, said two automobiles collided; that by reason

of the collision of said two automobiles, the said B. Richardson received divers and sundry serious injuries, whereby and on account thereof, the said B. Richardson had a claim and cause of action for damages against the said Gus Rote, by reason thereof; that thereafter to-wit, on the 25th day of September, A. D. 1917, Frank P. McCloskey, who was not then and there an attorney at law, having learned of the collision of said two automobiles as aforesaid, and of the injuries received thereby, by the said B. Richardson, and of the existence of the claim and cause of action arising thereby in favor of said B. Richardson against the said Gus Rote, for damages on account of the personal injuries aforesaid received by him, the said B. Richardson, as aforesaid, he, the said Frank P. McCloskey, in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, did see the said B. Richardson, and did then and there seek to obtain employment from the said B. Richardson, in said claim aforesaid, against the said Gus Rote, to prosecute, and to present and collect the same by means of personal solicitation of such employment from and by the said B. Richardson aforesaid, contrary to the statute in such case, made and provided, and against the peace and dignity of the State;

And the said L. S. Dupree, who after being by me duly sworn, on oath deposes and further says that he has good reason to believe and does believe, and therefore charges, that heretofore, to-wit, Jack W. Neal and Jack C. Neal, were doing business in the City of San Antonio, Bexar County, State of Texas, as co-partners, under the firm name of Jack W. Neal & Son; that among other things, the said Jack W. Neal & Son were engaged in the business of painting vehicles and buggies; that on June 23, A. D. 1917, one Edward Dwyer did employ the said Jack W. Neal & Son to paint a buggy owned by him, the said Edward Dwyer, whereby the said Edward Dwyer became justly indebted therefor to the said Jack W. Neal & Son in the sum of Ten Dollars and Fifty cents (\$10.50); that the said Edward Dwyer has never paid said sum of money to the said Jack W. Neal & Son, but still owes the said sum therefor, to them; that Frank P. McCloskey, who was not then and there an attorney at law, having learned of said transaction, and having learned that the said Edward Dwyer was so indebted, as above stated, to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty cents (\$10.50), as aforesaid, he, the said Frank P. McCloskey, did in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, go and see the said Jack W. Neal & Son in relation to their said claim against the said Edward Dwyer, and did then and there seek to obtain employment from said Jack W. Neal & Son in the said claim aforesaid, to prosecute, present and collect the same by means of personal solicitation of such employment from the said Jack W. Neal & Son, as aforesaid, and that in pursuance of said personal solicitation of such employment by the said Frank P. McCloskey, the said Jack W. Neal & Son did then and there deliver said claim aforesaid against the said Edward Dwyer, to him, the said Frank P. McCloskey, with full power and authority

to prosecute, present and collect the same, they agreeing to pay him, the said Frank P. McCloskey, a percentage of said claim aforesaid in the event he should succeed in collecting the same from the said Edward Dwyer, as aforesaid, contrary to the statute in such case made and provided against the peace and dignity of the State.

L. S. DUPREE.

Sworn to and subscribed before me, this the 4th day of October, A. D. 1917.

T. J. NEWTON,

County Attorney, Bexar County, Texas.

No. 13394. In the County Court for Criminal Cases, Bexar County, Texas. The State of Texas vs. Frank P. McCloskey. Complaint. Filed the 4th day of October, A. D. 1917. Witnesses: —.

8

"EXHIBIT C."

In the name and by the authority of the State of Texas:

Now comes T. J. Newton, County Attorney of Bexar County, Texas, upon affidavit of L. S. Dupree, hereto attached and made a part hereof, on behalf of said State, presents in the County Court of Bexar County, for Criminal Cases in Bexar County, Texas, at the October term, A. D. 1917, of said court, that heretofore, to-wit, on the 23rd day of September, A. D. 1917, in said County of Bexar, and the State of Texas, one Gus Rote and one B. Richardson were traveling and riding in Bexar County, Texas, upon a public road in said County, in two different automobiles, which were going in opposite directions; that through the carelessness and negligence of the said Gus Rote, the said two automobiles then and there collided; that by reason of the said collision of said two automobiles, the said B. Richardson received divers and sundry serious injuries, whereby and on account thereof, the said B. Richardson had a claim and cause of action for damages against the said Gus Rote, by reason thereof; that thereafter, to-wit, on the 25th day of September, A. D. 1917, Frank P. McCloskey, who was not then and there an attorney at law, having learned of the collision of said two automobiles, as aforesaid, and of the injuries received thereby, the said B. Richardson, and of the existence of the claim and cause of action arising thereby in favor of the said B. Richardson against the said Gus Rote, for damages on account of the personal injuries aforesaid, received by him, the said B. Richardson, as aforesaid, he, the said Frank P. McCloskey, in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, did see the said B. Richardson, and did then and there seek to obtain employment from the said B. Richardson in said claim aforesaid, against the said Gus Rote, to prosecute and to present and collect the same by means of personal solicitation of such employment from and by the said B. Richardson aforesaid, contrary to the statute in such case made and provided

and against the peace and dignity of the State, and the said T. J. Newton, County Attorney of Bexar County, Texas, upon affidavit of L. S. Dupree, hereto attached and made part hereof, and in behalf of the said State, further presents in the County Court of Bexar County for criminal cases in Bexar County, Texas, at the October term, A. D. 1917, of said Court; that theretofore, to-wit, Jack W. Neal and Jack C. Neal, were doing business in the City of San Antonio, Bexar County, State of Texas, as co-partners, under the firm name of Jack W. Neal & Son; that among other things, the said Jack W. Neal and Son were engaged in the business of painting vehicles and buggies; that on June 23, A. D. 1917, one Edward Dwyer, did employ the said Jack W. Neal & Son to paint a buggy owned by him, the said Edward Dwyer, whereby the said Edward Dwyer became justly indebted therefor, to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty cents, (\$10.50); that the said Edward Dwyer has never paid said sum to the said Jack W. Neal & Son, but still owes the said sum therefor to them; that Frank P. McCloskey, who was no- then and there an attorney at law, having learned of said transaction, and having learned that the said Edward Dwyer was so indebted as above stated to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty cents (\$10.50), as aforesaid, he, the said Frank P. McCloskey, did, in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, go and see the said Jack W. Neal & Son in relation to their said claim against the said Edward Dwyer, and did then and there seek to obtain employment from the said Jack W. Neal & Son, in the said claim aforesaid, to prosecute, present and collect the same by means of personal solicitation of such employment from the said Jack W. Neal & Son, as aforesaid, and that in pursuance of said personal solicitation of such employment, by the said Frank P. McCloskey, the said Jack W. Neal & Son did then and there deliver said claim aforesaid, against the said Edward Dwyer, to him, the said Frank P. McCloskey, with full power and authority to prosecute, present and collect the same; they agreeing to pay him, the said Frank P. McCloskey, percentage of said claim aforesaid, in the event he should succeed in collecting the same from the said Edward Dwyer, as aforesaid, contrary to the statute in such case made and provided and -gainst the peace and dignity of the State.

T. J. NEWTON,

County Attorney, Bexar County, Texas.

No. 13394. In the County Court of Bexar County, October Term, A. D. 1917. The State of Texas vs. Frank P. McCloskey. Offense of Barratry. Filed the 4th day of October, A. D. 1917.

Witnesses: —,

Ex Parte FRANK P. McCLOSKEY.

To the Honorable Judge of the County Court of Bexar County, for Criminal cases in Bexar County, Texas:

You- petitioner, Frank P. McCloskey, of said county and state, respectfully represents to Your Honor:

(1) That *is* is illegally restrained of his liberty, and confined by John W. Tobin, Sheriff of Bexar County, Texas; that your petitioner is so restrained of his liberty and confined by said John W. Tobin, Sheriff, by virtue of a certain capias issued upon and by virtue of a certain complaint and information filed in the County Court of Bexar County, for criminal cases in Bexar County, Texas, and which case is entitled: No. 13394, The State of Texas vs. Frank P. McCloskey," a copy of said capias, said complaint and said information are hereunto annexed to this petition, and the same are marked respectively, Exhibits A, B and C.

(2) Your petitioner further represents that in said complaint and information, he is charged with violation of an Act passed at the regular session of the 35th Legislature of the State of Texas, and being Chapter 133, approved March 29, A. D. 1917, and which Act is entitled: "An Act to amend Article 421 of the Penal Code
11 of the State of Texas, to further define barratry, so as to include the fomenting of litigation for profit, and by persons in addition to attorneys at law, by soliciting employment or advancing money or other thing of value to claimants, or to the parties to the litigations in order to procure employment;" that said information charges that your petitioner was not an attorney at law; your petitioner avers that said Act of the Legislature aforesaid, is wholly inoperative and void, insofar as the same relates to persons who are not attorneys at law, in that said provisions of said law are so indefinitely framed, and are of such doubtful construction, so that the same cannot be understood, either from the language in which such provisions are expressed, or from some other written law of the State as is provided by Article 6 of the Penal Code of the State of Texas.

(3) Claims for personal injuries as are all other claims, debts and choses of action, under the Constitution of the State and of the United States, and the law are property, and as such are subject to barter and sale, and are assignable; that the right to purchase all such claims and the right to solicit the purchase of such claims, and the right to seek employment, either as to the purchase of such claims or their collection or adjustment, is a lawful transaction and business, and such that all persons have a right to engage in; that said Act of the Legislature, insofar as it attempts to make penal such transactions, is absolutely null and void, in that the same is in violation of Section 3 of Article 1 of the Constitution of the State of Texas; that said statute is also in conflict with Section 19 of Article 1 of the Constitution of Texas.

(4) Your petitioner further avers that said statute is also null and void by reason of being in conflict with Section 1 of the 14th Amendment to the Constitution of the United States, which reads as follows:

"Article XIV.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the law."

That said statute violates the said Article of the Constitution of the United States, in that the same is class-legislation for the reason that said statute relates only to claims or debts and permits the adjustment of all other personal property, save and except claims and debts; that said statute denies and prohibits persons from engaging in a lawful business and denies to persons and particularly this petitioner the equal protection of the law.

(5) Your petitioner further avers that for and on account of each and all of the above and foregoing reasons, that said statute of the State of Texas, is unconstitutional, null and void, and that by reason thereof, your petitioner as aforesaid is unlawfully restrained of his liberty by the Sheriff of Bexar County, Texas, for an alleged violation of said statute.

Premises considered, your petitioner prays Your Honor to grant and issue, a writ of habeas corpus, commanding the said John W. Tobin, Sheriff of Bexar County, Texas, to bring your petitioner before Your Honor at such time and place as you may designate, in order that the cause of his restraint and confinement may be inquired into, and on a hearing of the same by Your Honor, he prays that he may be discharged from such alleged restraint and confinement, and that Your Honor will adjudicate, and decree said statute of the State of Texas, unconstitutional and null and void.

WARD & BICKETT,
Attorneys for Petitioner.

STATE OF TEXAS,
County of Bexar:

I, Frank P. McCloskey, being duly sworn, upon my oath say that the allegations set forth in the above petition are true according to my belief.

FRANK P. McCLOSKEY.

13 Subscribed and sworn to before me, by the said Frank P. McCloskey, on this, the 4th day of October, A. D. 1917.

[SEAL.]

S. C. GARDNER,
Notary Public, Bexar County, Texas.

STATE OF TEXAS,
County of Bexar:

The within application for a writ of habeas corpus was presented to me, this the 4 day of October, A. D. 1917, but on account of the public importance of the questions raised by the application for the writ of habeas corpus, and the fact that my decision would not be an authoritative and final construction of the statute involved, I hereby decline to grant the application for writ of habeas corpus as prayed for.

NELSON LYTLE,
*Judge of the County Court of Bexar County
for Criminal Cases, Bexar County, Texas.*

"EXHIBIT A."

THE STATE OF TEXAS,
County of Bexar:

To any Sheriff of the State of Texas, Greeting:

You are Hereby Commanded to arrest Frank P. McCloskey and him safely keep, so that you have him before the Honorable County Court of Bexar County, Texas, for Criminal Cases at the Court House of said County, in San Antonio, Instanter, then and there to answer The State of Texas upon a charge by information pending in said Court, wherein said defendant is charged with the offense of barratry.

Herein Fail Not, but of this writ make due return Instanter showing how you have executed the same.

Witness my signature and official seal at office in San Antonio, this 4th day of October A. D. 1917.

[SEAL.]

FRANK R. MEWTON,
*Clerk County Court Bexar County,
Texas, for Criminal Cases,*
By T. W. MASSEY, Deputy.

Issued 4th day of October A. D. 1917.

14

Sheriff's Return.

Came to hand the 4th day of October A. D. 1917, and executed on the 4th day of October A. D. 1917, by arresting the within named Frank P. McCloskey and taking him into custody.

_____,
Sheriff Bexar County, Texas,
By _____, Deputy.

Fees:

Making Arrest
 Mileage
 Taking Bond
 Commitment

Total.....\$

No. —. The State of Texas vs. Frank P. McCloskey. Capias.
 Filed this — day of —, A. D. 19—. Frank R. Mewton, Clerk
 County Court, Bexar County, Texas, for Criminal Cases, by —
 —, Deputy.

"EXHIBIT B."

In the name and by the authority of the State of Texas:

Before me, the undersigned authority, on this day personally appeared L. S. Dupree, who, after being by me duly sworn, deposes and says that he, the affiant, has good reason to believe and does believe, and therefore states and charges, that on the 23rd day of September, A. D. 1917, one Gus Rote and one B. Richardson, were traveling and riding in Bexar County, Texas, upon a public road in said county, in two different automobiles, which were going in opposite directions; that through the carelessness and negligence of the said Gus Rote, said two automobiles collided; that by reason of the collision of said two automobiles, the said B. Richardson received divers and sundry

serious injuries, whereby and on account thereof, the said
 15 B. Richardson had a claim and cause of action for damages against the said Gus Rote, by reason thereof; that thereafter to-wit, on the 25th day of September, A. D. 1917, Frank P. McCloskey, who was not then and there an attorney at law, having learned of the collision of said two automobiles as aforesaid, and of the injuries received thereby, by the said B. Richardson, and of the existence of the claim and cause of action arising thereby in favor of the said B. Richardson against the said Gus Rote, for damages on account of the personal injuries aforesaid received by him, the said B. Richardson, as aforesaid, he, the said Frank P. McCloskey, in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, did see the said B. Richardson, and did then and there seek to obtain employment from the said B. Richardson, in said claim aforesaid, against the said Gus Rote, to prosecute, and to present and collect the same by means of personal solicitation of such employment from and by the said B. Richardson aforesaid, contrary to the statute in such case, made and provided, and against the peace and dignity of the State;

And the said L. S. Dupree, who, after being by me duly sworn, on oath deposes and further says that he has good reason to believe and does believe, and therefore charges, that heretofore, to-wit, Jack W. Neal and Jack C. Neal, were doing business in the City of San Antonio, Bexar County, State of Texas, as copartners, under the firm

name of Jack W. Neal & Son; that among other things, the said Jack W. Neal & Son were engaged in the business of painting vehicles and buggies; that on June 23, A. D. 1917, one Edward Dwyer did employ the said Jack W. Neal & Son to paint a buggy owned by him, the said Edward Dwyer, whereby the said Edward Dwyer became justly indebted therefor to the said Jack W. Neal & Son in the sum of Ten Dollars and Fifty cents (\$10.50); that the said Edward Dwyer has never paid said sum of money to the said Jack W. Neal & Son, but still owes the said sum therefor, to them; that Frank P. McCloskey, who was not then and there an attorney at law, having

learned of said transaction, and having learned that the said Edward Dwyer was so indebted, as above stated, to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty cents (\$10.50), as aforesaid, he, the said Frank P. McCloskey, did in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, go and see the said Jack W. Neal & Son in relation to their said claim against the said Edward Dwyer, and did then and there seek to obtain employment from said Jack W. Neal & Son in the said claim aforesaid, to prosecute, present and collect the same by means of personal solicitation of such employment from the said Jack W. Neal & Son, as aforesaid, and that in pursuance of said personal solicitation of such employment by the said Frank P. McCloskey the said Jack W. Neal & Son did then and there deliver said claim aforesaid against the said Edward Dwyer, to him, the said Frank P. McCloskey, with full power and authority to prosecute, present and collect the same, they agreeing to pay him the said Frank P. McCloskey, a percentage of said claim aforesaid in the event he should succeed in collecting the same from the said Edward Dwyer, as aforesaid, contrary to the statute in such case made and provided against the peace and dignity of the State.

L. S. DUPREE.

Sworn to and subscribed before me, this the 4th day of October, A. D. 1917.

T. J. NEWTON,

County Attorney, Bexar County, Texas.

No. —. In the County Court for Civil Cases, Bexar County, Texas. The State of Texas vs. F. P. McCloskey. Complaint. Filed 4th day of October, A. D. 1917. Frank R. Newton, Clerk County Court, Bexar County.

17 In the name and by the authority of the State of Texas: Now comes T. J. Newton, County Attorney of Bexar County, Texas, upon affidavit of L. S. Dupree, hereto attached and made a part hereof, on behalf of said State, presents in the County Court of Bexar County, for Criminal cases in Bexar County, Texas, at the October Term, A. D. 1917, of said court, that heretofore, to-wit, on the 23rd, day of September, A. D. 1917, in said County of Bexar, and State of Texas, one Gus Rote nad one B. Richardson were

traveling and riding in Bexar County, Texas, upon a public road in said County, in two different automobiles, which were going in opposite directions; that through the carelessness and negligence of the said Gus Rote, the said two automobiles then and there collided; that by reason of the said collision of said two automobiles, the said B. Richardson received divers and sundry serious injuries, whereby and on account thereof, the said B. Richardson had a claim and cause of action for damages against the said Gus Rote, by reason thereof; that thereafter, to-wit, on the 25th day of September, A. D. 1917, Frank P. McCloskey, who was not then and there an attorney at law, having learned of the collision of said two automobiles, as aforesaid, and of the injuries received thereby, by the said B. Richardson, and of the existence of the claim and cause of action arising thereby in favor of the said B. Richardson against the said Gus Rote, for damages on account of the personal injuries aforesaid, received by him the said B. Richardson, as aforesaid, he, the said Frank P. McCloskey, in the county of Bexar and State of Texas, on the 25th day of September, A. D. 1917, did see the said B. Richardson, and did then and there seek to obtain employment from the said B. Richardson in said claim aforesaid, against the said Gus Rote, to prosecute and to present and collect the same by means of personal solicitation of such employment from and by the said B. Richardson, contrary to the statute in such case made and provided and against the peace and dignity of the State, and the said T. J. Newton, County Attorney of Bexar County, Texas, upon affidavit of L. S. Pupree, her-to attached and made a part hereof, and

18 in behalf of the said State, further presents in the County Court of Bexar County for Criminal Cases in Bexar County, Texas, at the October term, A. D. 1917, of said court; that heretofore, to-wit, Jack W. Neal and Jack C. Neal, were doing business in the City of San Antonio, Bexar County, State of Texas, as copartners, under the firm name of Jack W. Neal & Son; that among other things, the said Jack W. Neal & Son were engaged in the business of painting vehicles and buggies; that on June 23, A. D. 1917, one Edward Dwyer, did employ the said Jack W. Neal & Son to paint a buggy owned by him, the said Edward Dwyer, whereby the said Edward Dwyer became justly indebted therefor, to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty cents (\$10.50); that the said Edward Dwyer has never paid said sum of money to the said Jack W. Neal & Son, but still owes the said sum therefor to them; that Frank P. McCloskey, who was not then and there an attorney at law, having learned of said transaction, and having learned that the said Edward Dwyer was so indebted as above stated to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty cents (\$10.50), as aforesaid, he, the said Frank P. McCloskey, did, in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, go and see the said Jack W. Neal & Son in relation to their said claim against the said Edward Dwyer, and did then and there seek to obtain employment from the said Jack W. Neal & Son in the said claim aforesaid, to prosecute, present and collect the same by means of personal solicitation of such employment from the said

Jack W. Neal & Son, as aforesaid, and that in pursuance of said personal solicitation of such employment, by the said Frank P. McCloskey, the said Jack W. Neal & Son did then and there deliver said claim aforesaid, against the said Edward Dwyer, to him, the said Frank P. McCloskey, with full power and authority of prosecute, present and collect the same, they agreeing to pay him, the said Frank P. McCloskey, a percentage of said claim aforesaid, in the event he should succeed in collecting the same from the said Edward Dwyer, as aforesaid, contrary to the statute in such case made and provided and against the peace and dignity of the State.

19

T. J. NEWTON,

County Attorney, Bexar County, Texas.

No. 13394. In County Court for Civil Cases, Bexar County, Texas. The State of Texas vs. Frank P. McCloskey. Offense of Barratry. Filed the 4th day of October, A. D. 1917. Frank R. Newton, Clerk County Court, Bexar County, Texas, by ———, Deputy.

In the Court of Criminal Appeals, State of Texas.

No. 4773.

Ex Parte FRANK P. McCLOSKEY.

Petition for Writ of Habeas Corpus.

Application granted, returnable Oct. 17, 1917, before Court Criminal Appeal at Austin, Texas. Bond fixed at \$500.00 to be taken and approved by Sheriff of Bexar Co. in terms of the law for applicant's appearance before the Court Criminal Appeals until discharged by said Court.

By order of the Court.

W. L. DAVISON,
Presiding Judge.

Oct. 5, 1917.

Filed in Court of Criminal Appeals at Austin, Texas, Oct. 5, 1917. O. C. Kirven, Clerk, by Olin W. Finger, Deputy Clerk.

20 In the Court of Criminal Appeals of the State of Texas.

No. —.

Ex Parte FRANK P. McCLOSKEY.

Now comes John W. Tobin, Sheriff of Bexar County, Texas, and states that he waives the issuance and service upon him of the writ of habeas corpus in this case, and for return to said writ, he stated that he arrested relator, Frank P. McCloskey, by virtue of a capias issued by the Clerk of the County Court of Bexar County, Texas.

based upon a complaint and information filed in the County Court of Bexar County for Criminal Cases, true and correct copies of which capias, complaint and information are annexed to the petition of relator, Frank P. McCloskey, for writ of habeas corpus in this cause. That in obedience to the order of this court, he took and approved a bond from relator, Frank P. McCloskey, with good and sufficient sureties, approved by him, conditioned for his appearance before this honorable court to abide the judgment of this court, and that by virtue of said bond and order of this court, he released the said Frank P. McCloskey from his custody; that he has returned to this honorable court said bond aforesaid.

JNO. W. TOBIN.

Sworn to and subscribed before me, this the 16th day of October, A. D. 1917.

[SEAL.]

FELICE NEWTON,
Notary Public, Bexar County, Texas.

No. 4773. In the Court of Criminal Appeals of the State of Texas. Ex parte Frank P. McCloskey. Return of the Sheriff of Bexar County, Texas to the writ of Habeas Corpus. Filed in the Court of Criminal Appeals, at Austin, Texas. 10-16-17. O. C. Kirven, Clerk, by O. W. Finger, Deputy Clerk.

21 In the Court of Criminal Appeals of the State of Texas, October Term, A. D. 1917.

No. —.

EX PARTE FRANK P. McCLOSKEY.

It is agreed by and between Thomas J. Newton, County Attorney of Bexar County, Texas, and Ward & Bickett, attorneys for petitioner, Frank P. McCloskey, as follows:

I.

That all the material allegations set forth in the complaint and information, true and correct copies of which are attached to the application of Frank P. McCloskey for a writ of habeas corpus, are true in substance and in fact.

II.

That the questions to be determined on this habeas corpus proceeding are:

- (1) As to whether or not the barratry statute of the State of Texas is void for uncertainty as provided in Article 6 of the Penal Code of the State of Texas, and
- (2) As to whether or not the said barratry statute is null and void

by reason of being in conflict with either the Constitution of the State of Texas, or with the Constitution of the United States.

In witness whereof, we hereunto, this the 4th day of October A. D. 1917, sign our respective names hereto, with the understanding that this agreement is made for the purpose only of this habeas corpus proceeding.

T. J. NEWTON,
County Attorney, Bexar County, Texas.
WARD & BICKETT,
Attorneys for Petitioner, Frank P. McCloskey.

In the Court of Criminal Appeals of the State of Texas. Ex Parte Frank P. McCloskey. Agreement as to facts.

22

No. 4773.

Ex Parte FRANK McCLOSKEY.

From Bexar County.

Opinion by Judge Prendergast.

Relator remanded.

This cause came on to be heard on the original application for the writ of habeas corpus, for the discharge of relator, and the same being considered by the court, because it is the opinion of this court, that the relator Frank McCloskey, is legally restrained of his liberty, it is therefore ordered, adjudged and decreed by the court that the relator, Frank McCloskey, be remanded to the custody of the Sheriff of Bexar County. It is further ordered that the State of Texas do have and recover of and from the relator, Frank McCloskey, all costs incurred in this behalf in this court, and that this decision be certified to the Sheriff of Bexar County for his observance.

23

No. 4773.

Ex Parte FRANK McCLOSKEY.

From Bexar County.

Opinion.

This habeas corpus proceeding was instituted to test the validity of our barratry statute. Relator contends it is void and unconstitutional on these grounds, briefly stated:

1. Because so far as it relates to persons who are not attorneys, its provisions are so indefinitely framed, and are of such doubtful construction as to be inoperative under Art. 6 P. C.

2. Because, as claims for personal injuries, and all other choses in action, are property, and assignable, the right to solicit their purchase, and to seek employment to either collect or purchase them, is a lawful business, and all persons have a right to engage therein, and therefore said law is void because in violation of Secs. 3 and 10, Art. 1 of our Constitution.

3. Because it is in conflict with Sec. 1 of the 14th Amendment to the U. S. Constitution, in that it is class legislation, permitting the adjustment of all personal property except claims and debts, and denies to him the equal protection of the law.

The statute so attacked is the Act of Mch. 29, 1917, p. 336, the caption of which as corrected by the Act approved Mch. 29, 1917, p. 497, is:

"An Act to amend Article 421 of the Penal Code of the State of Texas, to further define "barratry" so as to include the fomenting of litigation for profit and by persons in addition to attorneys at law by soliciting employment or advancing money or other thing of value to claimants or to the parties to litigations in order to procure employment, or who practice law without license.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 421 of the Penal Code be, and is hereby amended so as to hereafter read as follows:

Article 421. (a) If any person shall wilfully instigate, maintain, excite, prosecute or encourage the bringing of any suit or suits at law or equity in any court of this State in which such person had no interest, for his own profit or with the intent to distress or harass the defendant therein, (b) or shall wilfully bring or prosecute any false suit or suits at law or equity, of his own, for his own profit or with the intent to distress or harass the defendant therein, (c) or shall wilfully instigate, maintain, excite, prosecute or encourage the bringing or presentation of any claim in which such person has no interest, for his own profit or with the intent to distress or harass the person against whom such claim is brought or prosecuted, (d) or shall seek to obtain employment in any claim, to prosecute, defend, present or collect the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such claim, (e) or who shall, by himself or another, seek or obtain such employment by giving, directly or indirectly, to the person from whom the employment is sought money or other thing of value, (f) or who shall, directly or indirectly, pay the debts or liabilities of the person from whom such employment is sought, (g) or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought before such employment, whether the same be done directly by him or through another, (h) or if any attorney at law shall seek or obtain employment in any suit or case at law, or in equity, to prosecute or defend the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such case, (i) or who shall, by himself or another, seek to obtain such employment by

giving directly or indirectly to the person from whom employment is sought money or other thing of value, (j) or who shall directly or indirectly pay the debts or liabilities of the person from whom such employment is sought, (k) or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought, before such employment, in order to induce such employment, whether the

25 same shall be done directly by him or through another, shall be deemed guilty of barratry, and shall upon conviction be punished by fine in any sum not to exceed five hundred (\$500.00) dollars, and may in addition thereto be imprisoned in the county jail not exceeding three months; provided, that the penalties hereinafter prescribed shall apply not only to attorneys at law, but to any other persons who may be guilty of any of the things set forth in the foregoing provisions of this Act. The term attorney shall include counsel at law; and any attorney at law violating any of the provisions of this law shall in addition to the penalty hereinafore provided, forfeit his right to practice law in this State, and shall be subject to have his license revoked and be disbarred in the manner provided by law for dishonorable conduct or malpractice, whether he has been convicted for violating this law or not.

Sec. 2. The evils sought to be remedied by this Act being such as to prevent amicable and just settlements of claims and disputes between parties and interfere with the due administration of justice in the courts, an emergency and an imperative public necessity exists that requires that the constitutional rule requiring bills to be read on three several days be suspended, and that this Act shall take effect from and after its passage, and it is so enacted."

We have subdivided said Act by letters *a*, *b*, *c* and so on, so that what is made an offense may be more readily seen, in the discussion. These subdivisions are not so designated in the Act itself.

The complaint and information herein was in two counts. The first avers that on Sept. 23, 1917:

"One Gus Rote and one B. Richardson were traveling and riding in Bexar County, Texas, upon a public road in said County, in two different automobiles, which were going in opposite directions; that through the carelessness and negligence of the said Gus Rote, the said two automobiles then and there collided; that by reason of the said collision of said two automobiles, the said B. Richardson received divers and sund-y serious injuries, whereby and on account thereof, the said B. Richardson had a claim and cause of

26 action for damages against the said Gus Rote, by reason thereof; that thereafter, to-wit, on the 25th day of September, A. D. 1917, Frank P. McCloskey, who was not then and there an attorney at law, having learned of the collision of said two automobiles, as aforesaid, and of the injuries received thereby, by the said B. Richardson, and of the existence of the claim and cause of action arising thereby in favor of the said B. Richardson against the said Gus Rote, for damages on account of the personal injuries aforesaid, received by him, the said B. Richardson, as aforesaid, the

said Frank P. McCloskey, in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, did see the said B. Richardson and did then and there seek to obtain employment from the said B. Richardson in said claim aforesaid, against the said Gus Bate, to prosecute and to present and collect the same by means of personal solicitation of such employment from and by the said B. Richardson aforesaid, contrary to the statute in such case made and provided and against the peace and dignity of the State."

The second avers: "That heretofore, to-wit, Jack W. Neal and Jack O. Neal, were doing business in the City of San Antonio, Bexar County, State of Texas, as co-partners, under the firm name of Jack W. Neal & Son; that among other things, the said Jack W. Neal & Son were engaged in the business of painting vehicles and buggies; that on June 23, A. D. 1917, one Edwards Dwyer, did employ the said Jack W. Neal & Son to paint a buggy owned by him, the said Edward Dwyer, whereby the said Edward Dwyer became justly indebted therefor, to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty cents (\$10.50); that the said Edward Dwyer has never paid said sum of money to the said Jack W. Neal & Son, but still owes the said sum therefor to them; that Frank P. McCloskey, who was not then and there an attorney at law, having learned of said transaction, and having learned that the said Edward Dwyer was so indebted as above stated to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty Cents (\$10.50), as aforesaid, he, the said Frank P. McCloskey, did, in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, go and see the said

27 Jack W. Neal & Son in relation to their said claim against the said Edward Dwyer, and did then and there seek to obtain employment from said Jack W. Neal & Son in the said claim aforesaid, to prosecute, present and collect the same by means of personal solicitation of such employment from the said Jack W. Neal & Son, as aforesaid, and that in pursuance of said personal solicitation of such employment, by the said Frank P. McCloskey, the said Jack W. Neal & Son did then and there deliver said claim aforesaid, against the said Edward Dwyer, to him, the said Frank P. McCloskey, with full power and authority to prosecute, present and collect the same, they agreeing to pay him, the said Frank P. McCloskey, a percentage of said claim aforesaid, in the event he should succeed in collecting the same from the said Edward Dwyer, as aforesaid," concluding as the previous count.

Relator was arrested and held under a proper warrant duly issued upon said information. He seeks release therefrom on the grounds above stated.

Barratry was an offense at common law, and is so made by statutes of many, if not all the States. As mentioned by the State in its brief, barrators are described by 4 Blackstone, p. 125 as "These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels."

That portion of said statute under which the information was drawn is to this effect: "If any person * * * shall seek to obtain employment in any claim, to prosecute, present or collect the same, by

means of personal solicitation of such employment, * * * he shall be deemed guilty of barratry," fined, &c.

This statute is clear and certain to the effect that it makes it an offense for any one, by personal solicitation to seek to be employed by another to prosecute or collect any claim such other may have.

That one may have the right to sell his unliquidated claim for damages for a personal injury to himself, or that he has the right to

28 assign any chose in action or other claim he may have against another, does not prevent the Legislature from making it unlawful for an outsider—a barrator—to do just what it did make it unlawful to do by said Act of 1917. As for that matter, the common law, in effect, forbade the sale of any chose in action. Our statute changed the common law in that respect (Art. 583 R. S.) and made them assignable. Prior to 1895 a claim of damages for personal injury was not assignable. (McCloskey v. San Antonio Trac. Co., 192 S. W. 1119.) The Legislature would have the power to again make all such claims unassignable, and these older laws would not control the effect of this amendment, but it would control and modify them.

It seems reasonably certain that the alleged acts of relator himself were the direct cause of the Legislature amending said Art. 421 of the Penal Code, by said Act of 1917. Before said Amendment, said Act read:

"If any person shall wilfully instigate, maintain, excite, prosecute or encourage the bringing of any suit at law or equity in any court of this State in which such person had no interest, with the intent to distress or harass the defendant therein, or shall wilfully bring or prosecute any false suit or suits at law or equity, of his own, with the intent to distress or harass the defendant therein, or, if any attorney at law shall seek or obtain employment in any suit or case at law or in equity, to prosecute or defend the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such cause, or who shall, by himself or another, seek or obtain such employment by giving to the person from whom the employment is sought money or other thing of value or who shall, directly or indirectly, pay the debts or liabilities of the person from whom such employment is sought, or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment, whether the same shall be done directly by him or through another, shall be deemed guilty of barratry, and shall, upon conviction, be punished by fine in any sum not to exceed five hundred dollars, and may in addition thereto be imprisoned in the county jail not exceeding three months.

29 The term attorney at law shall include counselor at law; and any attorney at law violating any of the provisions of this law, shall, in addition to the penalty hereinbefore provided, forfeit his right to practice law in this State, and shall be subject to have his license revoked and be disbarred in the manner provided by law for dishonorable conduct or malpractice, whether he has been convicted for violating this law or not."

Shortly prior to Feby. 1917, the San Antonio Traction Co. brought a suit for injunction against relator, setting up in detail a terrific state of facts which he had committed, which are stated by the San Antonio Court of Civil Appeals in the opinion, 192 S. W. Rep. 1117, and of which the opinion says: "The evidence introduced at the hearing is fairly summarized by the trial judge in his terse, lucid, and able opinion, as follows: 'The testimony offered by the plaintiff tends strongly to establish the material allegations in the plaintiff's petition. It appears that about 60 per cent of all the claims presented against the plaintiff are presented by the defendant. A large number of witnesses testified that they had received slight injuries, or been on cars which were derailed, in which they received practically no injuries; that they were not acquainted with the defendant or his agent, and that almost immediately after such accidents the defendant or his agent approached them and solicited his employment by the claimants, urging them to present claims against the plaintiff for large damages, and that, if they would give him the claims to handle, he could obtain large sums of money for them, and urging them to exaggerate their injuries, to remain in bed as long as they could endure it, and when they went out insisted upon their using crutches when not necessary, and by various means trying to induce them to assist him in obtaining large sums of money from the plaintiff, in many instances paying them a considerable sum of money in advance for the purpose of securing contracts of employment from them, and in some instances calling in a doctor to advise the claimants that they were seriously and permanently injured, when in truth and in fact they were only slightly injured, or not injured at all; that a great number of suits for hundred- of of thousands of dollars were filed by attorneys employed by the defendant on claims presented by the defendant, and that the defendant is still continuing said business, one claim having been presented during the hearing of this application, and that he proposed to so continue the same. Although the defendant and his principal agent and assistant were present in court during the hearing of this application and heard the testimony of these witnesses, in which they were charged with the things hereinabove stated, they did not take the stand to deny or refute the testimony of these witnesses. "The district court enjoined him, from which he appealed. The Court of Civil Appeals, in an opinion rendered Feby. 7, 1917, held that said Art. 421 as it then was restricted the offense of barratry to attorneys at law; saying: "It is clear that only an attorney at law is forbidden to solicit employment in any suit himself or by an agent. Why the Legislature left it lawful for a layman to do — impunity those things, which it made unlawful to be done by an attorney at law, we are not called upon to explain. It may be the Legislature did not anticipate that a layman would develop a large and lucrative business of speculation and peculation, as Judge Gould expressed it in the brief in the Bentineck Case, dealing with the accident of transportation companies. We find that there is not — force in this State any common law nor statutory law that makes it unlawful for a person, who is not — licensed attorney, to solicit employment as agent to ad-

just claims, nor to solicit claimants to present claims or sue upon them."

Thereupon the Legislature passed said amendment to cover this very omission, enacting "if any person" &c., and further enacting therein: "that the penalties hereinbefore prescribed shall apply not only to attorneys at law, but to any person who may be guilty of any of the things set forth in the foregoing provisions of this Act." The caption also makes it clear that all others, as well as attorneys, were embraced.

Surely such conduct by relator or any other, was such as would not only authorize, but require the Legislature, to make it an offense, and thereby seek to prevent in future such iniquitous conduct. But the policy of the Legislature is no concern of the courts, just
31 so it does not, by its legislation, violate the constitution.

There is nothing in said act contravening secs. 3 or 19, Art. 1, of our Constitution. The Act, so far as relator is concerned, applies to all persons alike, and gives no special privilege to any one, and denies none to him except which it denies to all others. Nor does said act deprive him, or any other, of life, liberty, property, privilege or immunity, except by due course of the law of the land. The Act itself is due course of law.

Neither is there anything in the Act smacking of class legislation. The reverse of this is true. It applies to every person who violates its provisions. It makes no class. But even if it did, the Legislature had the right, and in many instances it is its duty, to make classes in the enactment and enforcement of laws. See authorities in Note 10, p. 61 Harris' Texas Constitution.

Relator, by his able attorneys, has briefed this case from his standpoint in a clear and forcible manner, and cited authorities *caliming* they sustain his contentions. It, and the authorities cited by him, have had due and full consideration.

Because it is the opinion of this Court that said Act is valid and not unconstitutional it is ordered that relator be remanded to the custody of the Sheriff of Bexar County.

Relator remanded to custody.

PRENDERGAST, *Judge*.

(Delivered November 28th, 1918.)

No. 4773. Ex parte Frank P. McCloskey, Appellant, vs. The State of Texas, Appellee. Appeal from Bexar County. Relator Remanded. Opinion by Prendergast, Judge. Filed in Court of Criminal Appeals at Austin, Texas. 11-28-17. O. C. Kirven, Clerk, by O. W. Finger, Deputy.

32 In the Court of Criminal Appeals of the State of Texas,
October Term, A. D. 1917.

No. 4773.

Ex Parte FRANK P. McCLOSKEY.

Motion for Rehearing.

Now comes Frank P. McCloskey, relator herein and moves the court to set aside its judgment, heretofore rendered in this cause on November 28, 1917, remanding relator to the custody of the Sheriff of Bexar County, Texas, wherein this court held that the statute of the State of Texas, for violation of which relator was held, was constitutional, and to grant relator a rehearing, and on such rehearing to hold said statute unconstitutional and to render judgment discharging relator from his illegal restraint, for the following reasons, to-wit:

1. This court erred in holding said Act of the Legislature constitutional, because said act is wholly inoperative and void, in so far as the same relates to persons who are not attorneys at law; in that said provisions of said law are so indefinitely framed and are of such doubtful construction so that the same cannot be understood, either from the language in which such provisions are expressed, or from some other written law of the State, as is provided by Article 6 of the Penal Code of the State of Texas.

2. Because claims for personal injuries, as are all other claims, debts and choses in action, under the Constitution of the State and of the United States and the law, are property, and as such are subject to barter and sale and are assignable; that the right to purchase all such claims, and the right to solicit the purchase of such claims, and the right to seek employment, either as to the purchase of such claims or their collection or adjustment, is a lawful transaction and business, and such that all persons have the right to engage in; that said Act of the Legislature, in so far as it attempts to make penal such transaction is absolutely null and void, in that the same is in violation of Section 3 of Article 1 of the Constitution of the State of Texas; that said statute is also in conflict with Section 19 of Article 1 of the Constitution of Texas.

33 3. That choses in action and all rights and claims in and to property of every character and description, save and except choses in action arising from personal torts which die with the person, are property, and as such, are subject to barter and sale, and are assignable; that the right to purchase all such choses in action, and the right to solicit the purchase of the same, and the right to seek employment, either as to the purchase of such choses in action or their collection or adjustment, is a lawful transaction and business, and such that all persons have a natural right to engage in; that said Act of the Legislature, in so far as it attempts to make

penal such transaction, is absolutely null and void, in that the same is in violation of Section 3 of Article 1 of the Constitution of the State of Texas; that said statute is also in conflict with Section 19 of Article 1 of the Constitution of Texas; that this court erred in holding that the Act in question, making it a crime for relator to solicit from Jack W. Neal & Son the collection of the Dwyer debt, was constitutional, on account of the reasons above stated.

4. That said statute is also null and void by reason of it being in conflict with Section 1 of the 14th Amendment to the Constitution of the United States, in that the same is class-legislation; that said statute denies and prohibits persons from engaging in a lawful business, and denies to persons, and particularly to this petitioner, the equal protection of the law; that said statute in violation of said 14th Amendment, likewise, is an unlawful and unconstitutional interference with and abridgment of the right of making contracts, and denies to all persons, and particularly this relator, the right to engage in a legitimate and useful business.

5. That said Act of the Legislature is unconstitutional and void, because in direct conflict with Section 1 of the 14th Amendment to the Constitution of the United States, in that said statute, under the guise of a police regulation, is an unwarranted and arbitrary interference with relator's and other persons' constitutional rights to carry
34 on a lawful business, to make contracts and to use and enjoy property.

6. Because said Act of the Legislature is in conflict with Section 1 of the 14th Amendment to the Constitution of the United States, in that the same is an undue invasion of the personal liberty of the citizen.

7. That said Act of the Legislature is unconstitutional in that it violates the 14th Amendment to the Constitution of the United States, in that it is in restraint of the freedom of trade, denies equality before the law, is a denial of the citizen to act, and is class-legislation.

8. This court erred in holding that the statute in question is "clear and certain to the effect that it makes it an offense for anyone, by personal solicitation, to seek to be employed by another, to prosecute or collect any claim such other may have."

9. This court erred in its opinion where it says:

"That one may have the right to sell his unliquidated claim for damages for a personal injury to himself, or that he had the right to assign any chose in action or other claim he may have against another, does not prevent the Legislature from making it unlawful for an outsider—a barator—to do just what it did make it unlawful to do by said Act of 1917. As for that matter, the common law, in effect, forbade the sale of any chose in action. Our statute changed the common law in the respect (Art. 583 R. S.) and made them assignable. Prior to 1895 claim for damages for personal injuries as not assignable. (*McCloskey v. San Antonio Trac. Co.*, 192 S. W. 1119). The Legislature would have the power to again make all such claims unassignable, and these older laws would not control the effect of this amendment, but it would control and modify them."

Because (a) the right to sell or assign all choses in action, other than claims arising from torts to the person, which die with the person, is a natural right, and not derived from the common law or any statute; that right is not only a natural right, but it is a right guaranteed by the Constitution of the State of Texas and of the United States; which no legislature can take away from a citizen.

(b) All choses in action, with the exception of those above noted, being property, and the right to assign or sell the same not having been acquired either under the common law or a statute, the Legislature has no power to interfere with the right of the citizen to sell and assign the same and such right is especially guaranteed and protected by the Constitutions of both the State and the United States.

35 10. This court erred in basing its opinion upon, or being in any manner influenced by, the suit of the San Antonio Traction Co. brought against relator, because that suit was no part of the record in this cause, and furthermore, the judgment of the trial court was reversed by the Appellate Court, and the cause remanded back to the trial court. Hence, the proceedings in said suit were not available to be used by this court in its decision of the instant case.

11. This court erred in holding that the statute under consideration was not class-legislation, but that even if it was, notwithstanding that fact, the Act would be valid.

Relator avers that Honorable E. B. Hendricks and Honorable B. D. Tarlton are the attorneys of record for the State of Texas in this cause, both of whom reside in the City of Austin, Travis County, Texas.

Premises considered, relator prays this Honorable Court to set aside its judgment heretofore rendered, remanding him to the custody of the Sheriff of Bexar County, and to grant him a rehearing herein, and on such rehearing, to hold the statute under discussion in conflict with both the State and Federal Constitution, and therefore, null and void, and to enter a judgment discharging relator from his unlawful imprisonment.

WARD & BICKETT,
Attorneys for Relator.

36 *Argument.*

We request this court to again carefully reconsider our brief and the authorities therein cited, already filed in this cause. In addition thereto, we respectfully submit the following argument. The Court of Civil Appeals for the Fourth District, in the case of McCloskey vs. San Antonio Traction Company, 192 S. W. 1116, very properly held that the common law as to barratry, maintenance and champerty had never been a part of the law of Texas. That decision is fortified by the decisions of the Supreme Court. We admit that ordinarily it is within the power of the Legislature to alter or adopt the principles of the common law, but always with this qualification that the Legislature is powerless, whether it be under the guise of the police power of the State or as a manifestation of public policy ever, to enact a law which strikes down the guarantees protected and safe-

guarded to the citizen, by either the State or Federal Constitution. This court in *Ex parte Brown*, 38 Crim. App. on page 304, used this language:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty indeed, are under a solemn duty to look at the substance of things, wherever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." 123 U. S. 661.

We must concede the right of the Legislature to enact reasonable and proper laws regulating assignments of property, but such legislation must always be subordinate to the liberty of the citizen guaranteed by the two Constitutions. Now, if we will consider the statute in regard to barratry, before it was amended, and compare that with the amendment which is assailed in this proceeding, it will be seen that all of these acts, which were properly comprehended within the common law meaning or definition of barratry, are provided for in the amendment exactly as provided for in the

37 original statute. "As said in the oral argument in this cause, these provisions of the statute were not assailed in this proceeding. The original Article 421 of the Penal Code reads:

"If any person shall wilfully instigate, maintain, excite, prosecute or encourage the bringing of any suit or suits of law or equity in any court of this state in which such person has no interest, with intent to distress or harass the defendant therein, or shall wilfully bring or prosecute any false suit or suits at law or equity of his own, with intent to distress or harass the defendant therein," etc., etc. (The remainder of the section is devoted to attorneys at law.)

Upon turning to the Amendment under consideration, we find it reads as follows:

"If any person shall wilfully instigate, maintain, excite, prosecute or encourage the bringing of any suit or suits at law or equity in any court of this day, in which such person has no interest, for his own benefit or with intent to distress or harass the defendant therein, or shall wilfully bring or prosecute any false suit or suits at law or equity of his own, for his own profit, with intent to distress or harass the defendant therein, or shall wilfully instigate, maintain, excite, prosecute or encourage the bringing or presentation of any claim in which such person has no interest for his own benefit, or with intent to distress or harass the persons against whom such claim is brought or prosecuted, etc., etc."

That part of the original statute, and as amended, comes literally within the common law definition of barratry, and it is conceded that so far it was within the legislative power. It will be observed that the remainder of the amended statute enlarges the common law definition of barratry, in that the Act of the Legislature is not directed

38 as against acts which were denounced as barratrous under the common law, but it goes further and reaches legitimate and honest industrial pursuits, businesses and occupations which never came under the ban of the common law, and which are guaranteed and protected to the citizen by the Constitution of the State and the nation.

This court in its opinion says:

"Barratry was an offense at common law, and is so made by statutes of many, if not all, the states. As mentioned by the State in its brief, barrators are described by 4 Blackstone, p. 125 as 'These pests of civil society that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other man's quarrels.'"

Mr. Blackstone, in describing this pest, has described the acts recognized at common law as being barratrous, and acts that are denounced by the portions of the statute under consideration, which are in no manner assailed by us in this proceeding. To make this clear, we find in 7 Corpus Juris, the following definition of a common law libel, page 925:

"The employment of the term 'barratry,' or 'barretry,' as it is sometimes spelled, in common law dates from a very early period, and it is doubtful whether legal history accurately discloses its origin. The root or parent word is said to be found in the Sanskrit. It is 'bharat,' meaning war. It came into use in England, after the conquest, as an Anglo-Norman word signifying strife, contention, or wrangling, and was used in that sense by early English writers in several forms, such as barrat, baret, and barrette. From these sources two words came ultimately into use in England, 'barratry' and 'barrator.'

"Barratry, or, as it is designated, common barratry, is the crime or offense of frequently stirring up suits and quarrels between individuals, either at law or otherwise. Generally, by statute, common barratry is the practice of exciting groundless judicial proceedings. According to the law of Scotland barratry is also employed to designate the crime of a judge who is induced by a bribe to pronounce judgment. A barrator, or common barrator, is a common
39 mover, exciter, or maintainer of suits and quarrels, either in courts of justice or elsewhere in the country."

From this quotation, it is easy to perceive in what sense Blackstone called a barrator a pest of society. In quoting Blackstone, this court is bound to give to the quotation the meaning intended by the language by its author. As stated before, down to the point where we have quoted, the Amendment to the statute, barratry, as understood at the common law, was unquestionably prohibited. It is perfectly manifest, as we will demonstrate a little later on, that it was never intended by the common law, under the term "barratry" to prohibit the acquisition of choses in action, which we regard as property or property rights, in good faith and for a valuable consideration, other than those choses in action for injury to the person which died with the person and did not survive to the legal representatives or the heirs.

This court in its opinion, in utter disregard of that provision, asserts: "That one may have the right to sell his unliquidated claim for damages for a personal injury to himself, or that he has the right to assign any chose in action or other claim he may have against another, does not prevent the Legislature from making it unlawful, for an outsider—a barrator—to do just what it did make it unlawful to do by said Act of 1917. As for that matter, the common law in effect forbade the sale of any chose in action. Our statute changed the common law in that respect and made them assignable. Prior to 1895, a claim for damages for personal injury was not assignable. The Legislature would have the power to again make all such claims non-assignable, and those older laws would not control the effect of this amendment, but it would control and modify them."

This is unquestionably an incorrect statement of the law in so far as it asserts that the right to assign all choses in action was derived from the statute.

This court cites Article 583 of the Revised Statutes. That Article simply reads:

40 "The obligee, or assignee, of any written instrument, non-negotiable by the law merchant, may transfer to, and by, assignment all the interests he may have in the same."

That Article is a part of the Chapter of the Revised Statutes pertaining to bills, notes and other written instruments. That and the succeeding articles were only designed to provide for a suit in the name of an assignee, by preserving the equities existing at the time of the assignment. The Article does not purport to be a regulation, as we shall hereafter show, of an overwhelming number of choses in action, other than those resulting from torts to the person. This Article, as we will show, has been frequently construed as in no manner adding to the negotiability of the non-negotiable instruments, which from the earliest times, have been held to be assignable in equity, and, consequently, that assignability is not derived from this Article of the Revised Statutes, as the court seems to hold in its opinion. We concede that this court is correct in holding that assignments of those choses in action, which were not assignable, at law or in equity, and being those resulting from personal injuries which die with the person, were made assignable by statute as contended for by the court; and as to those particular choses in action, their assignability being derived from the statute, of course, could be destroyed by the statute. Now, if we turn to the Amendment of the Statute under consideration, commencing where our quotation quits, the Statute reads:

"* * * or shall seek to obtain employment in any claim, prosecute, defend, present or collect the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such claim, or who shall by himself, or another, seek to obtain such employment by giving, directly or indirectly, to the person from whom the employment is sought money or other thing of value, or who shall loan or promise to give, loan

or otherwise grant money or other valuable thing to the person from whom such employment is sought, before such employment, whether the same be done directly by him or through another, etc.,
41 shall be guilty of barratry."

As shown by us, the first part of the Statute amending Article 421, very properly prohibits those things which come within the common law definition of barratry. But, it will be observed that the latter part of the Statute, just herein quoted, prohibits action in reference to every character of claim or chose in action, including those which were always, from the earliest times, considered property rights, and assignable in equity, independently of any statute, as well as choses in action resulting from damages to the person whose assignability is only authorized by Statute. This Statute makes no discrimination between those choses in action, the acquisition of which is acquired in good faith and for a valuable consideration, and those which were fraudulent or acquired for such purpose as would bring it within the definition of barratry. This court, therefore, has drawn its conclusions in this case from an untenable premise, and consequently, the conclusions so drawn are contrary to the law and cannot stand the test of the law as laid down in the text books or contained in the decisions of the courts. The error of this court is in failing to draw the distinction between those choses in action resulting from torts to the person which die with the person, and those choses in action which were always regarded as assignable, and from time immemorial have been assignable in equity.

In 7 Cyc. page 524, it is said:

"Non-negotiable instruments were always transferable in equity, if not at law, and the assignee could bring suit in equity in his own name not only against his assignor but against prior parties. At common law, however, he could bring suit in his own name against his immediate assignor only and could not sue prior parties in his own name. He could sue the maker only in the name of the *the* original payee."

In 8 Corpus Juris, page 56, it is said:

"Non-negotiable bills or notes are assignable like other choses in action. This may be done by indorsement and delivery,
42 but it has been held that indorsement alone is insufficient. So the act of the payee in indorsing a guaranty on the back of a non-negotiable note, on transferring it, is sufficient to pass title, the same as if the instrument was negotiable."

The Supreme Court of this State in the case of Lakeview Land Company vs. San Antonio Traction Company, 66 S. W. 768, 769, being called upon to construe Article 583, in reference to a non-negotiable contract in writing, that is, non-negotiable in the sense of the law merchant, and Article 583, that only pertained to written instruments which were non-negotiable under the law merchant, use this language:

"We see no reason why the obligations of this contract could not be as well performed to any other owner of the lands mentioned as to the original land company, and we are of opinion that the assign-

ment would be effective under the general rule, independent of the statute."

A reading of the opinion will demonstrate that the court there expressly holds that, independent of Article 583, a non-negotiable contract was assignable in equity and it did not have to be authorized by Article 583 of the Statutes. There can be no controversy over the proposition that Article 583 of the Revised Statutes was never intended to regulate the assignment of choses in action in general, but was only attempting to prescribe a rule governing the assignment of written instruments which were non-negotiable under the law merchant. It, in no manner, attempted to regulate that vast army of choses in action which do not come within the meaning of non-negotiable written instruments.

In 32 Cyc, page 669 et seq. it is said:

"A chose in action is personal property. A chose in action has been defined as a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action; any right to damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract; or a right to personal things
43 of which the owner has not the possession, but merely a right of action for their possession. The last definition is substantially that given by Blackstone of property in action, which he further says depends entirely upon contracts either express or implied; but this statement is too limited, as the term 'chose in action' is now used to apply to rights of action arising out of tort as well as contract, and whether such right of action is for an injury to the person or to property. But the term 'chose in action' is used in contradistinction to chose in possession, and it is not every chattel, of which the owner is not in actual possession, that may be termed a chose in action and it is not a chose in action if the owner is in either the actual or constructive possession thereof. So also it must be a thing or claim for which an action may be brought, although it has been held that a present right of action is not necessary. While the application of the term 'chose in action' must in some cases be determined by the construction of a particular statute, it is, as ordinarily used, very broad and comprehensive, being applied both to the right of bringing an action and the thing itself, which is the subject-matter of the right, and it has been held to include bank-notes, a bill of lading, a certificate or share of stock in a corporation, unpaid subscriptions to the capital stock of a corporation, a judgment of a court, a life insurance policy, either before or after the death of the insured, a note payable in work, although the performance of the work has not been demanded, a warrant drawn upon the treasurer of a municipality, a bond, mortgage, or debt secured by bond and mortgage, an indebtedness for borrowed money, a debt due a plaintiff from a third person which defendant agreed to pay to the extent of a certain fund which was put into defendant's hands for that purpose, a claim for compensation for land taken by a city, any claim on which an action of assumpsit would lie at common law, a right to county bonds held in escrow and to be delivered upon the completion of a contract, a

44 right given by statute to recover money paid for intoxicating liquors, the right of the owner of a liquor tax certificate to recover its surrender value upon a discontinuation of the business under a statute requiring it to be refunded, a widow's right of dower in an estate in the hands of an administrator thereof, a right to have the interest of an heir in an estate in the hands of an administrator, a right of action for breach of contract, or for the specific performance of a contract, or for a tort connected with contract, or for the conversion of personal property, or an injury to real property, or for a personal injury, or for damages for malicious abuse of legal process, or for false representations as to the value of a thing sold, or an action of review which, by virtue of an adjudication of bankruptcy, became vested in the assignee."

The above enumeration in no manner covers the entire list of choses in action which are regarded as personal property.

In 5th Corpus Juris, page 846, 847, et seq. it is said:

"At the early common law choses in action, with few exceptions, were not assignable, unless the debtor assented to the assignment and promised to pay the assignee. The rule did not apply to negotiable instruments, to assignments by or to the king, to annuities, or to covenants annexed to or running with estates in land; and it was also held to have no application to foreign contracts, which, if assignable, where made, were recognized as assignable so as to pass the right to sue in the courts of England.

"It has frequently been said that the assignment of choses in action was prohibited at common law in accordance with the general doctrine that a man could not assign that which he did not have in possession; and particularly that to allow a man to make over to a stranger his right of going to law would be a great encouragement to litigiousness and would violate the rule against champerty and maintenance, enabling the rich and more powerful to work oppression and hardship on the lower classes. However much sup-

45 port the rule may have derived from these doctrines in after times, it doubtless originated in the doctrine of the early common law that choses in action are strictly personal obligations.

"At an early day courts of equity disregarded the common-law rule against the assignment of choses in action. There thus arose what is termed an 'equitable assignment,' which operated to give the assignee a title that, although not cognizable at law, equity will recognize and protect; and such assignments are enforced in equity, when they are made bona fide and for a valuable consideration. Such equitable assignments were recognized by common-law courts for some purposes. Thus the assignment of a chose in action was considered as a sufficient consideration to support a promise upon which an action of law could be maintained. So suits were permitted in the name of the assignor to the use of the assignee, and the assignee was protected against a release or other discharge by the assignor.

"In England statutes have been passed, from time to time, affecting the assignability of various choses in action. In the United States, in almost every jurisdiction, the doctrine that choses in ac-

tion are not assignable at law has been greatly modified by statute. In quite a number of the states the statutes which modify the common-law rule as to the assignability of choses in action have been construed to mean that all assignments formerly recognized in equity are equally valid at law, so as to permit the assignee thereof to sue thereon in his own name. Other statutes have been given a more limited operation. But the assignability of choses in action is now the rule, and nonassignability the exception; and this exception is generally confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature." (See also 5 Corpus Juris, page 996, 997.)

In 1st Tex. in the case of Ogden vs. Slayde, page 15, the Supreme Court of this State recognize the parole assignment of an ordinary debt, that it was enforceable in the courts of Texas.

In the case of Lassiter vs. National Bank, 96 Tex. 345, the Supreme Court of this State held that the claim for damages for the recovery of usury was assignable, and that the assignee could maintain a cause of action thereon in his own name and this occurred prior to the enactment of any statute permitting the assignment of such a cause of action.

In Marlin vs. Manning, 2nd Tex. 351, the Supreme Court held that suit could be brought by an assignee on a non-negotiable note in his own name, particularly in view of the fact that all distinctions between law and equity were abolished. The cause of action there passed upon arose prior to the existence of Article 583 of the Revised Statutes.

In the case of G. H. & S. A. R. R. v. Freeman, 57 Tex. 157, the Supreme Court were called upon to pass upon the assignability of an action for damages against a railroad company for killing stock. It must be borne in mind that this was prior to the passage of the Act making assignable causes of action, passed in 1895, and "relied upon by this court." The Supreme Court say:

"As to the question of assignability, Justice Story states the rule as follows: 'In general it may be affirmed that mere personal torts which die with the party and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights ad rem and re, possibilities, coupled with an interest, and claims growing out of and adhering to property, may pass by assignment.'" *Comegys v. Vosse*, 1 Pet., U. S., 213.

In *Simpkins Contract and Sales* (1st Ed.) page 314, it is stated:

"I think it may be stated, then, that all instruments evidencing any character of indebtedness, or any contract capable of being reduced to pecuniary valuation; all agreements to pay money or deliver property, all claims for damages to property may be assigned, because all claims of this nature survive death and would be assets in the hands of the legal representatives of the owners after death. Therefore, all choses in action are assignable. 12 T. C. A. 198; 124 Fed., 874.

Second. Warehouse receipts and kindred contracts. 1 T. C. A., 662; 84 S. W. R., 856; 93 S. W. R., 209.

Third. Bills of lading. 10 T., 19-20; 65 T., 72.

Fourth. Annuity out of an estate. 21 T., 491.

Fifth. Claims passing by inheritance, 80 Fed., 81; 7 T., 34.

Sixth. An approved and allowed claim against an estate; 31 T. 801.

Seventh. All contingent and executory interests in property. 7 T., 34.

Eighth. Contracts of sale. 13 T., 45.

Ninth. A deed may be assigned by endorsement. 84 T., 109.

Tenth. Insurance policies. 61 T., 287.

Eleventh. County warrants and similar paper. 62 T., 331.

Twelfth. Judgments. 23 S. W. R., 1050; 25 T. Supp., 127; 51 T., 199; 6 T. C. A., 610; R. S., Art. 4647, Act 1895; 39 S. W. R., 969.

Thirteenth. Damages resulting to property, 57 T., 156; 67 T., 500.

Fourteenth. Claims for destruction of property. 64 T., 617.

Fifteenth. Damages for failure to deliver property. 97 S. W. R., 689.

Sixteenth. Damages for breaches of contract. 74 S. W. R., 926-927.

These decisions are all predicated upon the assignability of the respective choses in action, independent of any statute.

In *Avery v. Popper & Bro.*, 92 Tex., 341, the Supreme Court of this State say:

"At common law a part of a debt could not be assigned. Such assignment was void and passed no title or right whatever in the claim, and of course no action could be maintained by the assignee of a portion of a claim. But in equity such assignments are sustained, and it is now the established doctrine in this State that a claim may be assigned in parts to different persons, each of whom acquires a right to so much of the common fund and is entitled to maintain an action thereon against the debtor. *Harris County v. Campbell*, 68 Texas, 22; *Clark v. Gillespie*, 70 Texas, 513; *Johnson v. Improvement Co.*, 88 Texas, 505."

In the case of *Hale vs. Hollon*, 90 Tex. 427, the Supreme Court of this State held that, independent of any statute, "a mere expectancy of inheritance, as heir or next of kin of one living, may be, in equity, the subject of sale and conveyance."

To the same effect is *Moore vs. Moore*, 59 Tex. 54.

In the case of *People vs. Steele*, 14 L. R. A. (N. S.) 362, the Supreme Court of Illinois held the law void and unconstitutional which attempted to prevent speculating in theater tickets, because it interfered with the right of property and the right of making contracts.

In the case of *Martin vs. Western Union Telegraph Company*, 1st T. C. A. 145, decided in 1892, prior to the legislation of 1895, alluded to by this court in its opinion, the Court of Civil Appeals was called to pass upon the assignability of a claim for damages against the Telegraph Company, resulting from its negligence in failure to deliver a telegram. The Court held that the claim was assignable.

In the case of *Trustee's Union Baptist Association vs. F. M. Hunn*,

it was held that the visitatorial power of one who conveys property in trust for charitable purposes is assignable.

We especially commend this court to a perusal of the case of *Winn vs. Ft. Worth and Rio Grande Railway Company*, 12 T. C. A., page 198, in which the Court of Civil Appeals were called upon to construe the assignability of a claim against a railroad company for a penalty given by statute for the failure of the railroad to furnish cars on demand. The decision in that case goes thoroughly into the doctrine of the assignability of such choses in action, independent of and prior to any statute of this State upon the subject. The opinion is too long to quote from, but with all due respect, we urge upon this court its careful perusal.

49 Among other cases cited, the court cites the case of *Carter vs. McDermett*, 12 Tex. 548, which we also especially commend to the consideration of this court.

In the *Winn* case, the court say in speaking of the assignment of choses in action:

"The apprehension that justice would be trodden down if property in action should be transferred is no longer entertained, and the ancient rule now serves only to give form to some legal proceedings. In the courts of equity this rule was never followed, and those courts have always considered and treated the rule as unjust and have supported assignments of rights of action. Experience has fully shown not only that no evil results from the assignments of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in action as well as of property in possession."

Under the ancient common law a person out of possession of real estate was not permitted to institute suit for its recovery; for many strange and, at this day and time, many incomprehensible reasons. It was attempted at an early day to invoke that doctrine in the Courts of Texas. The question came up in *Carter vs. McDermett*, 12 Tex. 547, 548. The Supreme Court very properly held the doctrine as not being applicable to this State, and among other things, said on page 549:

"It will be admitted as a principle not to be questioned, that the power to alienate property is a necessary consequence of ownership, and is founded on natural right. True, it must be subjected to the restraints suggested by convenience, and dictated by the laws, but wherever restrictions of any rigor, from considerations of policy, well or ill-founded, have been imposed on alienation, history reveals the fact of incessant struggles against the thralldom. And the success of these efforts appears to have been commensurate with the advancement of civilization, and of more just and enlightened views
50 relative to the true uses of property as subservient to the multiplied wants of refined social life.

And again on page- 551 and 552, the Supreme Court say:

The fact that persons out of possession may sell titles which have no foundation in law, and which may be purchased for no other purpose than vexation and the profits of litigation, it is no sufficient

reason why all lawful owners, ousted of possession, shall be deprived of control over their property. This would be punishing the community in order that some pests might not escape. If the ancient rules of the Common Law with respect to the non-assignability of mere rights or choses in action, and also with respect to the modes of conveyance of real property, were still recognized, then there might be some reason for the rule. For, at Common Law, no interest could be conveyed except where the grantor was in actual or constructive possession of the thing granted. And this was on the general ground that such conveyance would multiply suits, and would be transferring law suits to strangers. Hence, a debt or other chose in action could not be assigned, nor could a right of entry or action in real property. This notion against the assignment of choses in action has long since been exploded."

It must not be overlooked that this was language employed by the Supreme Court of this State in 1854, entered prior to the legislation of 1895. From what has been presented, we feel confident that this court must be convinced that it is in error wherein it lays down the proposition that the assignability of all choses in action must be derived from either Article 583 of the Revised Statutes, or the legislation alluded to by the court. If this proposition is true, then the foundation upon which the opinion of this court is constructed is destroyed. We have conceded that so far as the assignability of a claim for damages resulting from personal injury is concerned, that that is

derived from legislative enactment, and that as this court
51 says, that power that made it assignable can destroy its assignability. But the Statute, that we are attacking, goes further than that. It relates to other choses in action, among which are embraced the claim of Jack W. Neal and Son for an ordinary debt, the assignability of which was not derived from Article 853 of the Revised Statutes, or any Legislative Act of this State, but existed at all times as a property right, that is, the incident to the ownership of this debt was the right of this owner to assign it. This was a natural right of which the owner of the claim could not be deprived by legislation. As insisted in our original brief, this statute goes too far, and is an unwarrantable interference, in many respects, with the right of contract, which is protected by the Constitution of the State and the nation. This law absolutely prohibits the great institutions of Dunn and Bradstreet from, in the ordinary course of their business, soliciting for collection, honest claims and debts against merchants and others throughout the United States; this statute prohibits the bankers throughout this State from soliciting from their outside and country correspondents the collection of debts as to those who live in the place where the soliciting banks are situated. In fact, it interferes with many honest and useful lines of business that contribute so much to the commercial welfare of the whole people.

It also prohibits the owners of choses in action, other than those which die with the person, from having the right to sell and dispose of their property, a right given them by the Constitution of Texas and the United States.

This court, itself, in the case of Owens vs. State, 53 Cr. Apps. held that the statute which put a prohibitive tax upon dealers purchasing wages was unconstitutional from a twofold standpoint. First, it prohibited the purchaser by a prohibitive tax, and indirectly prohibited the owner of the claim from selling. This court said:

52 "A person living under the protection of this government has the right to adopt and follow any lawful industrious pursuit not injurious to the community, which he may see fit. And as incident to this, is the right to labor or employ labor, make contracts in respect thereto, upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell and convey property of every kind. Is not a man's wages for his time 'property'? If so, has he not the right under the Constitution to sell and convey such property? If a law be passed that prohibits the purchase of his 'time' or labor, does it not abridge his right of contract? Does it not deprive him of selling what is his? Does it not follow that a prohibitive tax upon parties who would buy his labor, deprives the laborer of the right to sell 'original foundation of other property'? The enjoyment or deprivation of these rights and privileges, constitutes the essential distinction between freedom and slavery, between liberty and oppression."

It certainly necessarily follows that if you prohibit purchaser of claims or persons from soliciting claims for collection, that to that extent you interfere with the owner of the claim in his right of selling the same or in his right to place his claim for collection with a collector.

The statute is a two-edged sword. It cuts both ways. It affects the owner of a chose in action, as well as it affects the intended purchaser thereof or a solicitor for its collection. This court is well aware of the rule which holds that where the provisions of a statute are so mutually dependent upon each other and are so interwoven as to be dependent upon one another, that if some of the provisions fail on account of unconstitutionality, the whole statute upon that subject must likewise fail. It is unnecessary to cite authorities upon that provision. If this Amendment to Article 421 is unconstitutional in part, it is unconstitutional as a whole.

In conclusion we respectfully insist that the decision of the court in this case is wrong, it is contrary to the law as laid down in the text books, and is wholly without support in the decisions of the courts. We therefore earnestly urge the granting of our
53 motion for rehearing and the rendition of a judgment discharging relator from his unlawful imprisonment.

Respectfully submitted,

(Signed)

WARD & BICKETT,
Attorneys for Relator, Frank P. McCloskey.

54

No. 4773.

Ex Parte FRANK McCLOSKEY.

From Bexar County.

Opinion by Judge Prendergast.

Rehearing overruled.

This cause came on to be heard on the appellant's motion for rehearing, and the same being considered, it is ordered, adjudged and decreed by the court that said motion be and the same is hereby in all things overruled.

55

No. 4773.

Ex Parte FRANK McCLOSKEY.

From Bexar County.

Opinion.

On Motion for Rehearing.

In his motion for rehearing the relator again urges, in a forcible brief and argument, substantially the same contentions made by him in the original submission of this cause. As contended by the State in its brief and argument, in reply to relator's, there is no substantial difference from his original insistence. It would seem needless, then, to further discuss any of them. However, it is thought best to cite and quote from some of the many decisions, especially from the United States Supreme Court, directly in point, establishing the law clearly against relator's contentions.

The statute which he attacks and the complaint and information against him thereunder, were quoted in the original opinion; also the grounds of his attack were stated therein. It is unnecessary to repeat any of these. The authorities, and quotations therefrom, which will now be given, are so clearly applicable it will be unnecessary to enter into any specific application of them in this opinion.

The United States Supreme Court, in *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 623, laid down the correct doctrine applicable herein, as follows:

"It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are sub-

56 ject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy, and dispose of property is declared in the Constitution of several states to be one of the inalienable rights of man. But this declaration is not held to preclude the Legislature of any state from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void or voidable; when they shall be in writing and when they may be made orally, and by what instruments it may be conveyed or mortgaged,—are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non lædas* is a maximum of universal application.

“For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business.”

That great court, in *Purity Extract & T. Co. v. Lynch*, 226 U. S. 201, 57 L. ed. 187, again laid down the unquestionable doctrine applicable herein, as follows:

“It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; 57 *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Ah Sin v. Wittman*, 198 U. S. 500, 504, 49 L. ed. 1142, 1144, 25 Sup. Ct. Rep. 756; *New York ex rel. Silz v. Hasterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; *Murphy v. California*, 225 U. S. 623, 56 L. ed. 1229, 32 Sup. Ct. Rep. 697. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system.

“Thus, in *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425, the defendant was convicted under a statute of that state which made it a criminal offense to give an option to buy grain at a future time. It was contended that the statute, as interpreted by the state court, was ‘not directed against gambling contracts relating to the selling or buying of grain or other commodities,

but against mere options to sell or buy at a future time without any settlement between the parties upon the basis of differences, and therefore involving no element of gambling.' The argument was that it directly forbade the citizen 'from pursuing a calling which, in itself, involves no element of immorality.' This court, in sustaining the judgment of conviction, said: 'If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear unmistakable infringement of rights secured by the fundamental law.' It must be assumed, it was added, that 'the legislature was of opinion that an effectual mode to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time'; and the court could not say that the means employed were not appropriate to the end which it was competent for the state to accomplish. (id. pp. 429, 430.)

"The same principle was applied in *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168, which dealt with the provision of the Constitution of California that all contracts for the sale of shares of the capital stock of any corporation, on margin, or to be delivered at a future day, should be void, and that any money paid on such contracts might be recovered. The objection urged against the provision in its literal sense was that the prohibition of all sales on margin bore no reasonable relation to the evil sought to be cured; but the court upheld the law, being unwilling to declare that the deep-seated conviction on the part of the people concerned as to what was required to effect the purpose could be regarded as wholly without foundation. (id. pp. 609, 610.)

"A strong illustration of the extent of the power of the state is found in *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10. The state of New York, by its forest, fish and game law, prohibited the possession of certain game during the close season. The statute covered game coming from without the state. It appeared that Silz was charged with the possession of plover and grouse which had been lawfully taken abroad during the open season and had been lawfully brought into the state; that these game birds were varieties different from those known as plover and grouse in the state of New York; that, although of the same families, in form, size, color, markings, they could readily be distinguished from the latter; and that they were wholesome and valuable articles of food. This court affirmed the conviction, saying: 'It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all

59 that would be required for the protection of domestic game.

But, subject to constitutional limitations, the legislature of the state is authorized to pass measures for the protection of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.' It was pointed out that the prohibition in question had been found to be expedient in several states, 'owing to the possibility that dealers in game may sell birds of a domestic kind under the claim that they were taken in another state or country.' "

In *Patzone v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 543, the same doctrine as above announced was again reiterated and emphasized. In that case an act of the legislature of Pennsylvania was under consideration which made it an offense for any resident foreign born person to own or be possessed of a shot-gun or rifle in that state, and also forfeited such weapon. The object of the legislature of that state, in enacting that law, was to protect wild game in that state. The United States Supreme Court sustained the validity of that law. It is unnecessary to quote the opinion.

In 6 Ruling Case Law, 193, based on the decisions of the United States Supreme Court and of many of the states of the United States, the principles applicable herein are clearly laid down. Some of these will be here quoted. Sec. 192 is:

"All property within the jurisdiction of a state, however unqualified may be the title of the owner, is held on the implied condition or obligation that it shall not be injurious to the equal right of others to the use and benefit of their own property. In other words, all property is held subject to the general police power of the state so to regulate and control its use in a proper case as to secure the general safety, the public welfare, and the peace, good order and morals of the community. Accordingly it is a fundamental principle of the constitutional system of the United States that rights of property, like all other social and conventional rights, are subject to such

60 reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in it by the Constitution may think necessary and expedient. And to these ends the legislature under its police power may pass laws regulating the acquisition, enjoyment and disposition of property, even though in some respects these may operate as a restraint on individual freedom or the use of property. The subordination of property rights to the just exercise of the police power has been said to be as complete as is the subjection of these rights to the proper exercise of the taxing power, and it is held that this implied condition is quite irrespective of the source or character of the title. This principle is in effect an application of the maxim which underlies the police power, *sic utere tuo ut alienum non laedas*."

Again in Sec. 211, p. 217, it is laid down:

"It cannot be question- that the state, under its police power, has the right to regulate any and all kinds of business, to protect the public health, morals and welfare, subject to the restrictions of

reasonable classification. If a vocation or the mode of exercising it inflicts injury to the rights of others, or is inconsistent with the public welfare, it may be regulated and restrained by the state, by the exercise of its police power, and this power is not confined to the regulation of those classes of business which are essentially illegal, for it extends likewise to lawful callings. In this connection it has been declared that the right of regulation is an exception to the general rule that every person has the right to pursue any lawful calling. * * * It is not necessary that it always affect injuriously the public at large. On the contrary, it may be regulated if it affects injuriously those engaged in it or those brought into direct contact with it, even though its pursuit may benefit generally the people of the state at large."

Again in Sec. 214, p. 221, it is said:

"Since all rights are held subject to the police power of the state, when necessary the legislature may prohibit absolutely the maintenance of any particular business if the public safety or the public morals require its discontinuance; and the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. A calling may not be immoral in itself, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." See also *Claunch vs. State*, — S. W. —; *Johnson vs. Elliott*, 168 S. W. 968.

In the original opinion, in the case from the Court of Civil Appeals at San Antonio, cited and quoted from, it is clearly shown that the business followed by relator, and doubtless by others who have followed the same business, was most pernicious and vicious; that it had a tendency to, if it did not actually produce, fraud, and fabrication of a most injurious character. There can be no doubt under the authorities and reason that the legislature had the right to enact the law attacked by the relator herein, and that it is valid and constitutional.

Particular stress and a great many authorities are cited by relator in his motion and brief herein, contending, in effect, that where it was stated in the original opinion that the common law, in effect, forbade the sale of any chouse in action, and that our statute (Art. 583 R. S.) changed the common law so as to make them assignable, is not correct, relator claiming and citing many authorities to the effect that either at common law as in later years declared, and particularly in equity, all choses in action were assignable. Perhaps

62 the said statement in the court's opinion may have been too broad, but whether the statement therein was correct, or relator's contention is correct, did not and could not materially affect the conclusion reached in the original opinion. So that it is unnecessary now to further state or discuss that question. It might be conceded for the sake of the argument that relator's contention is correct and the statement by the court was incorrect. The same result from the authorities would be reached.

The motion for rehearing is overruled.

PRENDERGAST, *Judge*.

Delivered January 16, 1918.

63 In the Court of Criminal Appeals of the State of Texas,

No. 4733.

Ex Parte FRANK P. McCLOSKEY.

To the Honorable W. L. Davidson, Presiding Judge of the Court of Criminal Appeals of the State of Texas:

Now comes Frank P. McCloskey, relator in the above numbered and entitled cause, by his attorney, R. H. Ward, and files this, his petition for the allowance of a writ of error from the Supreme Court of the United States to the Court of Criminal Appeals of the State of Texas, wherein he complains and alleges: that he is a citizen of the United States and of the State of Texas; that in the above numbered and entitled cause, final judgment was rendered on the 16th day of January A. D. 1918, against your petitioner by the Court of Criminal Appeals of the State of Texas, that being the highest court possessing criminal jurisdiction and of the subject matter in said proceeding in the State of Texas and being the court having final custody of the record in said cause, wherein it was adjudged that relator's petition for writ of habeas corpus be dismissed and he be remanded to the custody of John W. Tobin, Esquire, Sheriff of Bexar County, Texas; that in said cause there is drawn in question the validity of a statute of the State of Texas, viz., Chapter 133, page 336 of the Acts of the 35th Legislature, providing among other things, that

"If any person (not an attorney at law) * * * shall seek to obtain employment in any claim, or prosecute, defend, present or collect the same by means of personal solicitation of such employment or by procuring another to solicit for him employment in such claim, * * * he shall be deemed guilty of barratry, and shall, upon conviction, be punished * * * etc.," upon the ground of

64 its being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, as especially set up and claimed by plaintiff in error; that the decision of the Court of Criminal Appeals of the State of Texas is and has been in favor of the validity of said statute of the State of Texas, thereby depriving relator, a citizen of the United States and of the State of

Texas, of rights, privileges and immunities secured to citizens of the United States and of said state, and of liberty and property, without due process of law, and denying to him the equal protection of the laws, in contravention of Section 1 of the 14th Amendment to the Constitution of the United States.

Wherefore, your petitioner prays that the petition for allowance of a writ of error from the Supreme Court of the United States to the Court of Criminal Appeals of the State of Texas, be allowed; that citation be granted and signed; that the writ of error bond, herewith presented, be approved; and that upon relator's entering into a bail bond in such sum as may be fixed by the court, he may be released from the custody of John W. Tobin, Esquire, Sheriff of Bexar County, Texas, pending the review of this cause and the judgment of this court herein by the Supreme Court of the United States.

(Signed)

FRANK P. McCLOSKEY,

By R. H. WARD, *His Attorney.*

The writ of error as prayed for in the foregoing petition is hereby allowed, this the 14 day of February A. D. 1918. The writ of error bond, in the sum of \$250.00, herewith presented, is hereby approved; the bail bond of relator is fixed at the sum of One Thousand Dollars, and upon his entering into the same with proper security, as provided by law, it is ordered that he be released from the custody of the Sheriff of Bexar County, pending the review of this cause and the judgment herein by the Supreme Court of the United States.

(Signed)

W. L. DAVIDSON,

*Presiding Judge of the Court of Criminal
Appeals of the State of Texas.*

65 In the Court of Criminal Appeals of the State of Texas.

No. 4773.

Ex Parte FRANK P. McCLOSKEY.

Know All Men By These Presents: That we, Frank P. McCloskey, and Aug. Limberger and C. C. Harris, as sureties, are held and firmly bound unto the State of Texas and John W. Tobin, Sheriff of Bexar County, Texas, in the sum of \$250.00, to be paid to the State of Texas and John W. Tobin, Sheriff of Bexar County, Texas, and his successors in office, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated, this the 12th day of February, in the year of our Lord, One Thousand, Nine Hundred and Eighteen.

Whereas, the above named Frank P. McCloskey has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Court of Criminal Appeals of the State of Texas;

Now, therefore, the condition of this obligation is such that if the

above named Frank P. McCloskey, plaintiff in error, shall prosecute his said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

(Signed)

FRANK P. McCLOSKEY.

Sureties:

(Signed)

AUG. LIMBERGER.

(Signed)

C. C. HARRIS.

The foregoing bond is hereby approved, this the 14 day of February, A. D. 1918.

(Signed)

W. L. DAVIDSON,

Presiding Judge of the Court of Criminal

Appeals of the State of Texas.

66 I, C. C. Harris, do solemnly swear that I am worth, in my own name, the sum of at least \$500.00, after deducting from my property that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description whether individual or security debts, and after satisfying all incumbrances on my property, which are known to me; that I reside in Bexar County, State of Texas, and have property in said State liable to execution more than the sum of \$500.00.

(Signed)

C. C. HARRIS.

Sworn to and subscribed before me, the undersigned authority on this, the 12th day of February, A. D. 1918.

(Signed)

McCOLLUM BURNETT,

[SEAL.]

Notary Public, Bexar County, Texas.

I, Aug. Limberger, do solemnly swear that I am worth, in my own name, the sum of at least \$500.00, after deducting from my property that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description whether individual or security debts, and after satisfying all incumbrances on my property, which are known to me; that I reside in Bexar County, State of Texas, and have property in said State liable to execution more than the sum of \$500.00.

(Signed)

AUG. LIMBERGER.

Sworn to and subscribed before me, the undersigned authority on this, the 12th day of February, A. D. 1918.

(Signed)

McCOLLUM BURNETT,

[SEAL.]

Notary Public, Bexar County, Texas.

67 In the Court of Criminal Appeals of the State of Texas.

No. 4773.

Ex Parte FRANK P. McCLOSKEY.

The above entitled matter coming on to be heard upon the petition of Frank P. McCloskey, the relator therein, for a writ of error from the Supreme Court of the United States to the Court of Criminal Appeals of the State of Texas, and upon examination of said petition and the record in said matter, desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that a writ of error be and is hereby allowed to the Court of Criminal Appeals of the State of Texas from the Supreme Court of the United States, and that the bond presented by the petitioner be and the same is hereby approved.

(Signed)

W. L. DAVIDSON,
*Presiding Judge of the Court of Criminal
Appeals of the State of Texas.*

68 UNITED STATES OF AMERICA:

The President of the United States of America to The Honorable the Judges of the Court of Criminal Appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of Criminal Appeals of the State of Texas, before you, or some of you, being the highest court of law of the said state in which a decision could be had in the said cause, wherein Frank P. McCloskey is relator and John W. Tobin, Sheriff of Bexar County, Texas, is respondent, and wherein was drawn in question, upon the ground of its being repugnant to Section 1 of the 14th Amendment to the Constitution of the United States, and the decision of the Court of Criminal Appeals of the State of Texas is and has been in favor of, the validity of an Act of the Legislature of the State of Texas, being Chapter 133 at page 336 of the Acts of the 35th Legislature, and the decision was against the rights, privileges and immunities specially set up and claimed under said clause of the Constitution of the United States, a manifest error hath happened to the great damage of the said Frank P. McCloskey, as appears by his complaint, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you

have the same at Washington within thirty days from date hereof, in the Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, the 14th day of February in the Year of Our Lord, One Thousand, Nine Hundred and eighteen.

(Signed)
[SEAL.]

D. H. HART,
*Clerk of the District Court of the United
States for the Western District of Texas,*
By A. B. COFFEE, Deputy.

70 UNITED STATES OF AMERICA:

The President of the United States to John W. Tobin, Sheriff of Bexar County, Texas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Court of Criminal Appeals of the State of Texas, wherein Frank P. McCloskey, relator, is plaintiff in error and you, the respondent, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. L. Davidson, presiding judge of the Court of Criminal Appeals of the State of Texas, this the 14 day of February, in the Year of Our Lord, One Thousand, Nine Hundred and Eighteen.

(Signed)

W. L. DAVIDSON,
*Presiding Judge of the Court of Criminal
Appeals of the State of Texas.*

On this, the 19th day of February, in the Year of Our Lord, One Thousand, Nine Hundred and Eighteen, personally appeared before me, the undersigned authority, Lawrence Allen, and made oath that he delivered a true copy of the within citation to John W. Tobin, Sheriff of Bexar County, Texas, defendant in error.

(Signed)

LAWRENCE ALLEN.

Sworn to and subscribed before me, the undersigned authority on this, the 19th day of February, A. D. 1918.

(Signed)
[SEAL.]

JOHN J. BICKETT, Jr.,
Notary Public, Bexar County, Texas.

71 In the Court of Criminal Appeals of the State of Texas.

No. 4773.

Ex Parte FRANK P. McCLOSKEY.

Now comes, relator, Frank P. McCloskey, plaintiff in error, and respectfully submits: that in the record, proceedings, decision and final judgment of the Court of Criminal Appeals of the State of Texas, in the above numbered and entitled matter, there is manifest error in this to-wit:

First, the court erred in holding that the provisions of Chapter 133, page 336, of the Acts of the 35th Legislature are not in conflict with and in violation of the provisions of the 14th Amendment of the Constitution of the United States, for that the State of Texas, by and through the provisions of said Chapter 133 of the Acts of the 35th Legislature assumes and seeks (1) to deprive plaintiff in error and certain other citizens of the United States and of the State of Texas, of rights, privileges and immunities secured to all citizens of the United States and of said State; (2) to deprive plaintiff in error and other citizens of the United States of liberty and of property without due process of law; (3) to deprive and to deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Texas the equal protection of the law.

Second, the court erred in holding that, by the provisions of said Act, the plaintiff in error is not deprived of rights, privileges and immunities secured to him and all other citizens of the United States and of the State of Texas by the Federal Constitution and laws of the United States.

Third, the court erred in holding that, by provisions of said Act, the plaintiff in error is not deprived of liberty and property without due process of law.

72 Fourth, the court erred in holding that the provisions of said Act do not deny to plaintiff in error the equal protection of the law.

Fifth, the court erred in holding that the said Act is within the police power of the Legislature of the State of Texas.

Sixth, the court erred in holding the said Act not to be an abridgement of the inalienable and constitutional right of plaintiff in error to pursue a lawful vocation in a lawful way, without interference by the State.

Seventh, the court erred in holding that the provisions of said Act do not deprive plaintiff in error of the right to earn a livelihood in the pursuit of a lawful, legitimate and beneficial occupation, and of the liberty of contract in reference to said business.

Eighth, the court erred in holding that the provisions of said Act do not unlawfully and unconstitutionally discriminate between the owners of debts, claims and demands and the owners of all other character of property.

Ninth, the court erred in holding that the provisions of said Act do not unlawfully discriminate between persons engaged in the business of soliciting and collecting claims and persons engaged in other businesses and vocations.

Tenth, the court erred in ordering the judgment and in entering judgment discharging the writ of habeas corpus and remanding the plaintiff in error to the custody of John W. Tobin, Esquire, Sheriff of Bexar County, Texas.

(Signed)

R. H. WARD,

Attorney for Plaintiff in Error.

73 THE STATE OF TEXAS:

I, O. C. Kirven, Clerk of the Court of Criminal Appeals of the State of Texas, at Austin, do hereby certify that the above and foregoing contain a true and correct copy of the proceedings had in the Court of Criminal Appeals in cause No. 4773, Ex Parte Frank P. McCloskey, from Bexar County, as the same now appears of record and on file in my office.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court this the 4th day of March, A. D. 1918.

[Seal Court of Criminal Appeals of Texas.]

O. C. KIRVEN,

*Clerk of the Court of Criminal Appeals
of the State of Texas,*

By OLIN W. FINGER,
Deputy Clerk.

Endorsed on cover: File No. 26425. Texas Court of Criminal Appeals. Term No. 958. Frank P. McCloskey, plaintiff in error, vs. John W. Tobin, Sheriff of Bexar County, Texas. Filed April 8th, 1918. File No. 26425.

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1918.

FRANK P. McCLOSKEY, PLAINTIFF IN ERROR,
versus
JOHN W. TOBIN, SHERIFF BEXAR COUNTY, TEXAS,
DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

Plaintiff in error, Frank P. McCloskey, was charged by information filed in the County Court of Bexar County, Texas, for criminal cases, with the offence of barratry. A capias was issued upon this information, by virtue of which he was arrested by John W. Tobin, Sheriff of Bexar County, Texas, defendant in error. Thereupon, plaintiff in error presented an application for a writ of *habeas corpus* to the County Court of Bexar County, Texas, for criminal cases, which court refused to grant the writ upon the ground that the barratry statute was attacked as being

unconstitutional and the decision of said court would not finally determine the matter. Thereupon, plaintiff in error applied for a writ of *habeas corpus* to the Court of Criminal Appeals of the State of Texas, the highest court in the State, for the determination of criminal matters. Plaintiff in error, among other things, charged in his application for the writ of *habeas corpus*:

“(1) That he is illegally restrained of his liberty and confined by John W. Tobin, Sheriff of Bexar County, Texas; that your petitioner is so restrained of his liberty and confined by John W. Tobin, Sheriff of Bexar County, Texas, by virtue of a certain *capias* issued upon and by virtue of a certain complaint and information filed in the County Court of Bexar County for criminal cases in Bexar County, Texas, and which case is entitled ‘13394 The State of Texas vs. Frank P. McCloskey’; a copy of said *capias* and said complaint and said information are hereunto annexed to this petition and the same are marked respectively Exhibits A, B, and C.”

“(2) Your petitioner represents that in said complaint and information he is charged with a violation of an Act passed at the regular session of the Thirty-fifth Legislature of the State of Texas and being Chapter 133, approved March 29, A. D. 1917, and which Act is entitled ‘An Act to amend Article 421 of the Penal Code of the State of Texas, to further define barratry so as to include the fomenting of litigation for profit, and by persons in addition to attorneys at law, by soliciting employment or advancing money or other thing of value to claimants, or to the parties to the litigation ‘in order to procure employment’; that said information charges that your petitioner was not an attorney at law; your petitioner avers that said Act of the Legislature aforesaid is wholly inoperative and void, insofar as the same relates to persons who are not attorneys at law, in that said provisions of said law

are so indefinitely framed, and are of such doubtful construction, so that same cannot be understood, either from the language in which such provisions are expressed, or from some other written law of the State as is provided by Article 6 of the Penal Code of the State of Texas.

"(3) Claims for personal injuries, as are all other claims, debts and choses in action, under the Constitution of the State and of the United States, and the law, are property, and as such, are subject to barter and sale, and are assignable; that the right to purchase all such claims and the right to solicit the purchase of such claims, and the right to seek employment, either as to the purchase of such claims, or their collection or adjustment, is a lawful transaction and business, and such that all persons have a right to engage in, that said Act of the Legislature, insofar as it attempts to make penal such transactions, is absolutely null and void, in that the same is in violation of Section 3 of Article 1 of the Constitution of the State of Texas; that said statute is also in conflict with Section 19 of Article 1 of the Constitution of the State of Texas.

"(4) Your petitioner further avers that said statute is also null and void by reason of being in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, which reads as follows: (The Fourteenth Amendment is here set out in the petition, but it is omitted from this statement of the case). That said statute violates the said article of the Constitution of the United States in that the same is class legislation, for the reason that said statute relates only to claims or debts and permits the adjustment of all other personal property, save and except claims and debts; that said statute denies and prohibits persons from engaging in a lawful business and denies to persons and particularly this petitioner the equal protection of the law.

—4—

"(5) Your petitioner further avers that, for and on account of each and all of the above and foregoing reasons, that said statute of the State of Texas is unconstitutional, null and void, and that by reason thereof your petitioner, as aforesaid, is unlawfully restrained of his liberty by the Sheriff of Bexar County, Texas, for such alleged violation of said statute; all of which more particularly appears in petitioners said application for a writ of *habeas corpus*, an order of the judge of the County Court refusing the same, hereto attached to this petition and made part of the same.

"Premises considered, your petitioner prays your Honors to grant and issue a writ of *habeas corpus*, commanding the said John W. Tobin, Sheriff of said Bexar County, to bring your petitioner before your Honors at such time and place as you may designate, in order that the cause of his restraint and confinement may be inquired into; and upon a hearing of the same by this Honorable court, he prays that he may be discharged from his illegal restraint and confinement; and pending the hearing of this application, he prays that he may be admitted to bail in such sum as this Honorable court may fix.

"WARD & BICKETT,
"Attorneys for Petitioner."

The petition was duly sworn to by plaintiff in error. (Printed Record, pp. 1-2).

Attached to the petition for a writ of *habeas corpus* is a copy of the capias and the return of the sheriff showing the arrest of the plaintiff in error. (Printed Record, pp. 3-4). Honorable W. L. Davidson, Presiding Judge of the Court of Criminal Appeals, granted the writ of *habeas corpus* as prayed for and made the same returnable before the Court of Criminal Appeals at Austin, Texas, on October 17, 1917. (Printed Record, p. 14). The information on which the capias was issued for the arrest of plaintiff in error is as follows:

"In the name and by the authority of the State of Texas:

"Now comes T. J. Newton, County Attorney of Bexar County, Texas, upon affidavit of L. S. Dupree, hereto attached and made a part hereof, on behalf of said State, presents in the County Court of Bexar County for criminal cases in Bexar County, Texas, at the October Term, A. D. 1917, of said court, that heretofore, to-wit: on the 23rd day of September, A. D. 1917, in said County of Bexar, and State of Texas, one Gus Rote and one B. Richardson were traveling and riding in Bexar County, Texas, upon a public road in said county, in two different automobiles, which were going in opposite directions; that through the carelessness and negligence of the said Gus Rote, the said two automobiles then and there collided; that by reason of the said collision of said two automobiles, the said B. Richardson received divers and sundry serious injuries, whereby and on account thereof, the said B. Richardson had a claim and cause of action for damages against the said Gus Rote, by reason thereof; that thereafter, to-wit: on the 25th day of September, A. D. 1917, Frank P. McCloskey, who was not then and there an attorney at law, having learned of the collision of said two automobiles, as aforesaid, and of the injuries received thereby, by the said B. Richardson, and of the existence of the claim and cause of action arising thereby in favor of the said B. Richardson against the said Gus Rote, for damages on account of the personal injuries aforesaid, received by him the said B. Richardson, as aforesaid, he, the said Frank P. McCloskey, in the County of Bexar, and State of Texas, on the 25th day of September, A. D. 1917, did see the said B. Richardson, and did then and there seek to obtain employment from the said B. Richardson in said claim aforesaid, against the said Gus Rote, to prosecute and to present and collect the same by means of personal solicitation of such employment from and by the said B. Richardson, contrary to the statute in such

case made and provided and against the peace and dignity of the State.

"And the said T. J. Newton, County Attorney of Bexar County, Texas, upon affidavit of L. S. Dupree, hereto attached and made a part hereof, and in behalf of the said State, further presents in the County Court of Bexar County for criminal cases in Bexar County, Texas, at the October Term, A. D. 1917, of said court, that heretofore, to-wit, Jack W. Neal and Jack C. Neal, were doing business in the city of San Antonio, Bexar County, Texas, as co-partners, under the firm name of Jack W. Neal & Son; that among other things, the said Jack W. Neal & Son were engaged in the business of painting vehicles and buggies; that on June 23, A. D. 1917, one Edward Dwyer, did employ the said Jack W. Neal & Son to paint a buggy owned by him, the said Edward Dwyer, whereby the said Edward Dwyer became justly indebted therefor, to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty Cents (\$10.50); that the said Edward Dwyer has never paid said sum of money to the said Jack W. Neal & Son, but still owes the said sum therefor to them; that Frank P. McCloskey, who was not then and there an attorney at law, having learned of said transaction, and having learned that the said Edward Dwyer was so indebted as above stated to the said Jack W. Neal & Son, in the sum of Ten Dollars and Fifty Cents (\$10.50), as aforesaid, he the said Frank P. McCloskey, did, in the County of Bexar and State of Texas, on the 25th day of September, A. D. 1917, go and see the said Jack W. Neal & Son in relation to their said claim against the said Edward Dwyer, and did then and there seek to obtain employment from the said Jack W. Neal & Son in the said claim aforesaid, to prosecute, present and collect the same by means of personal solicitation of such employment from the said Jack W. Neal & Son, as aforesaid, and that in pursuance of said personal solicitation of such employment, by the said Frank P. McCloskey, the said Jack W.

Neal & Son did then and there deliver said claim aforesaid, against the said Edward Dwyer, to him, the said Frank P. McCloskey, with full power and authority to prosecute, present and collect the same, they agreeing to pay him, the said Frank P. McCloskey, a percentage of said claim aforesaid, in the event he should succeed in collecting the same from the said Edward Dwyer, as aforesaid, contrary to the statute in such case made and provided and against the peace and dignity of the State.

"T. J. NEWTON,

"County Attorney, Bexar County, Texas."

"No. 13394. In County Court for Civil Cases, Bexar County, Texas. The State of Texas vs. Frank P. McCloskey. Offense of Barratry. Filed the 4th day of October, A. D. 1917. Frank R. Newton, Clerk County Court, Bexar County, Texas, by, Deputy." (Printed Record, pp. 12-14).

The case was tried in the Court of Criminal Appeals upon an agreed statement made between the attorney of Bexar County and Ward & Bickett, attorneys for plaintiff in error, and which agreed statement is as follows:

"1.

"That all the material allegations set forth in the complaint and information, true and correct copies of which are attached to the application of Frank P. McCloskey for a writ of *habeas corpus*, are true in substance and in fact.

"That the questions to be determined on this *habeas corpus* proceeding are:

"(1) As to whether or not the barratry statute of the State of Texas is void for uncertainty as provided in Article 6 of the Penal Code of the State of Texas, and

"(2) As to whether or not the said barratry statute is null and void by reason of being in conflict with either the Constitution of the State of Texas, or with the Constitution of the United States.

"In witness whereof, we hereunto, this 4th day of October, A. D. 1917, sign our respective names hereto, with the understanding that this agreement is made for the purpose only of this *habeas corpus* proceeding.

"T. J. NEWTON,

"County Attorney, Bexar County, Texas.

"WARD & BICKETT,

"Attorneys for Petitioner, Frank P. McCloskey."

"In the Court of Criminal Appeals of the State of Texas. *Ex Parte* Frank P. McCloskey. Agreement as to facts." (Printed Record, pp. 15-16).

The Court of Criminal Appeals on hearing, held that plaintiff in error was not illegally restrained of his liberty and entered judgment remanding him to the custody of the Sheriff of Bexar County. (Printed Record, p. 16).

The Court of Criminal Appeals in its opinion held the Act of the Legislature in question was not in conflict with either the Constitution of the State, or with the Fourteenth Amendment to the Constitution of the United States. (Printed Record, pp. 16-22).

Plaintiff in error filed an elaborate motion for rehearing in the Court of Criminal Appeals (Printed Record, pp. 23-36), which was overruled by the court (Printed Record, p. 37). The court wrote an additional opinion overruling the motion for rehearing (Printed Record, pp. 37-42). In this opinion the court, more elaborately than in the original opinion, holds that the law in question was a valid exercise of the police power of the State, and in consequence thereof, was not in conflict with the Fourteenth Amendment to the Constitution of the United States. This case is now before this court upon a writ of error to the Court of Criminal Appeals of the State of Texas, the writ of error having been allowed by Honorable W. L. Davidson, presiding Judge of the Court of Criminal Appeals of the State of Texas. (Printed Record, pp. 42-43).

SPECIFICATIONS OF ERROR.

"In the Court of Criminal Appeals of the State of Texas. No. 4773. *Ex Parte* Frank P. McCloskey.

"Now comes relator, Frank P. McCloskey, plaintiff in error, and respectfully submits: That in the record, proceedings, decision and final judgment of the Court of Criminal Appeals of the State of Texas, in the above numbered and entitled matter, there is manifest error in this to-wit:

"First, the court erred in holding that the provisions of Chapter 133, page 336, of the Acts of the Thirty-fifth Legislature are not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, for that the State of Texas, by and through the provisions of said Chapter 133 of the Acts of the Thirty-fifth Legislature assumes and seeks, (1) to deprive plaintiff in error and certain other citizens of the United States and of the State of Texas, of rights, privileges and immunities secured to all citizens of the United States and of said State; (2) to deprive plaintiff in error and other citizens of the United States of liberty and of property without due process of law; (3) to deprive and to deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of Texas the equal protection of the law.

"Second, the court erred in holding that, by the provisions of said Act, the plaintiff in error is not deprived of rights, privileges and immunities secured to him and all other citizens of the United States and of the State of Texas by the Federal Constitution and laws of the United States.

"Third, the court erred in holding that, by provisions of said Act, the plaintiff in error is not deprived of liberty and property without due process of law.

"Fourth, the court erred in holding that the provisions of said Act do not deny to plaintiff in error the equal protection of the law.

"Fifth, the court erred in holding that the said Act is within the police power of the Legislature of the State of Texas.

"Sixth, the court erred in holding the said Act not to be an abridgement of the alienable and constitutional right of plaintiff in error to pursue a lawful vocation in a lawful way, without interference by the State.

"Seventh, the court erred in holding that the provisions of said Act do not deprive plaintiff in error of the right to earn a livelihood in the pursuit of a lawful, legitimate and beneficial occupation, and of the liberty of contract in reference to said business.

"Eighth, the court erred in holding that the provisions of said Act do not unlawfully and unconstitutionally discriminate between the owners of debts, claims and demands and the owners of all other character of property.

"Ninth, the court erred in holding that the provisions of said Act do not unlawfully discriminate between persons engaged in the business of soliciting and collecting claims and persons engaged in other business and vocations.

"Tenth, the court erred in ordering the judgment and in entering judgment discharging the writ of *habeas corpus* and remanding the plaintiff in error to the custody of John W. Tobin, Esquire, Sheriff of Bexar County, Texas.

"(Signed) R. H. WARD,

"Attorney for Plaintiff in Error."

(Printed Record, pp. 47-48).

BRIEF OF ARGUMENT.

Plaintiff in error is charged by the information hereinbefore set out, with violating the Act of the Legislature of Texas, approved March 29, 1917, being Chapter 133 of the Acts of the 35th Legislature, page 336, the title of which Act is, "An Act to Amend Article 421 of the Penal Code of the State of Texas, to further define barratry so as to include the fomenting of litigation for profit, and by persons in addition to attorneys at law, by soliciting employment or advancing money or other thing of value to claimants, or to the parties to litigations, in order to procure employment," and the only question presented in this case is as to whether or not the above Act of the Legislature is a valid exercise of the police power of the State, or as to whether or not the Act in question violates the Fourteenth Amendment to the Constitution of the United States. The first count in the information charges plaintiff in error with seeking to obtain employment from B. Richardson in a claim against one Gus Rote, to prosecute and to present and collect the same, by means of personal solicitation of such employment from the said B. Richardson, said claim in favor of B. Richardson against the said Rote, resulting from an automobile driven by the said Rote colliding with an automobile driven by the said Richardson, whereby the said Richardson received serious and permanent injuries, due to the carelessness and negligence of the said Gus Rote.

The second count charges that Jack W. Neal & Son were engaged in the business of painting buggies, and that one Dwyer had them paint a buggy owned by him, whereby he became indebted to them in the sum of \$10.50, that they have been unable to collect said claim, and that plaintiff in error sought to obtain employment from them in said claim aforesaid, to prosecute, present and collect the same, by means of personal solicitation of such employment, and that in pursuance of said personal solicitation of such employ-

ment, said claim was delivered to relator with full power and authority to prosecute, present and collect the same, they agreeing to pay him a percentage of said claim in the event he should succeed in collecting the same.

Said information also charges that plaintiff in error was not a practicing attorney at law. It will be observed that the Act of the Legislature of Texas involved in this proceeding was an Act Amending Article 421 of the Penal Code of the State, it might therefore be useful in this connection to set forth Article 421 as it originally was and then follow with the Act of the Legislature Amending that Article which is attacked in this case:

"Art. 421. (290) 'BARRATRY' DEFINED AND PUNISHED.—If any person shall wilfully instigate, maintain, excite, prosecute or encourage the bringing of any suit or suits at law or equity in any court of this State in which such person has no interest, with the intent to distress or harass the defendant therein, or shall wilfully bring or prosecute any false suit or suits at law or equity, of his own, with the intent to distress or harass the defendant therein, or, if any attorney at law shall seek or obtain employment in any suit or case at law, or in equity, to prosecute or defend the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such cause, or who shall, by himself or another, seek or obtain such employment, by giving to the person from whom the employment is sought money or other thing of value, or who shall directly or indirectly, pay the debts or liabilities of the person from whom such employment is sought, or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought, before such employment, in order to induce such employment, whether the same shall be done directly by him, or through another, shall be deemed guilty of barratry, and shall, upon conviction, be punished

by a fine in any sum not to exceed five hundred dollars, and may in addition thereto be imprisoned in the county jail not exceeding three months. The term attorney at law shall include counselor at law; and any attorney at law violating any of the provisions of this law, shall, in addition to the penalty hereinbefore provided, forfeit ~~his~~ right to practice law in this State, and shall be subject to have his license revoked and be disbarred in the manner provided by law for dishonorable conduct or malpractice, whether he has been convicted for violating this law or not. (Act Aug. 21, 1876, p. 227; amended 1901, p. 125)." (See Art. 421, Vernon's Criminal Stat., 1916).

The amendatory Act is as follows:

"AMENDMENT OF 'BARRATRY' STATUTE.

"H. B. No. 502.

"Chapter 183.

"An Act to Amend Article 421 of the Penal Code of the State of Texas, to further define 'barratry' so as to include the fomenting of litigation for profit and by persons in addition to attorneys at law by soliciting employment or advancing money or other thing of value to claimants or to the parties to litigations in order to procure employment.

"Be It Enacted by the Legislature of the State of Texas:

"Section 1. That Article 421 of the Penal Code be, and is hereby amended so as to hereafter read as follows:

"Article 421. If any person shall wilfully instigate, maintain, excite, prosecute or encourage the bringing of any suit or suits at law or equity in any court of this State in which such person has no interest, for his own profit, or with the intent to distress or harrass the defendant therein, or shall wilfully bring or prosecute any false suit or suits at law or equity, of his own, for his own profit, or with the intent to distress or harass the defendant

therein, or shall wilfully instigate, maintain, excite, prosecute or encourage the bringing or presentation of any claim in which such person has no interest, for his own profit or with the intent to distress or harass the person against whom such claim is brought or prosecuted, or shall seek to obtain employment in any claim, to prosecute, defend, present or collect the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such claim, or who shall, by himself or another, seek or obtain such employment by giving, directly or indirectly, to the person from whom the employment is sought money or other thing of value, or who shall directly or indirectly, pay the debts or liabilities of the person from whom such employment is sought, or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought before such employment, whether the same be done directly by him or through another, or if any attorney at law shall seek or obtain employment in any suit or case at law, or in equity, to prosecute or defend the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such cases, or who shall, by himself or another, seek to obtain such employment by giving directly or indirectly to the person from whom employment is sought money or other thing of value, or who shall directly or indirectly pay the debts or liabilities of the person from whom such employment is sought, or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought, before such employment, in order to induce such employment, whether the same shall be done directly by him or through another, shall be deemed guilty of barratry, and shall upon conviction be punished by a fine in any sum not to exceed five hundred (\$500.00) dollars, and may in addition thereto be imprisoned in the county jail not exceed-

ing three months; provided that the penalties hereinafore prescribed shall apply not only to attorneys at law, but to any other persons who may be guilty of any of the things set forth in the foregoing provisions of this Act. The term attorney at law shall include counsel at law; and any attorney at law violating any of the provisions of this law shall in addition to the penalty hereinabove provided, forfeit his right to practice law in this State, and shall be subject to have his license revoked and may be disbarred in the manner provided by law for dishonorable conduct or malpractice, whether he has been convicted for violating this law or not.

"Section 2. The evils sought to be remedied by this Act being such as to prevent amicable and just settlements of claims and disputes between parties and interfere with the due administration of justice in the courts, an emergency and an imperative public necessity exists that requires that the constitutional rule requiring bills to be read on three several days be suspended, and that this Act shall take effect from and after its passage, and it is so enacted.

"Approved March 29, 1917.

"Takes effect 90 days after adjournment."

It will be observed that Article 421 of the Penal Code is amended only in the following particulars: First the words "for his own profit or" are inserted just before the clauses "with intent to distress or harass the defendant"; second, the following is added by the amendatory statute, "or shall wilfully instigate, maintain, excite, prosecute or encourage the bringing or presentation of any claim in which such person is not interested, for his own profit or with the intent to distress or harass the person against whom such claim is brought or prosecuted, or shall seek to obtain employment in any claim, to prosecute, defend, present or collect the same, by means of personal solicitation of such employment, or by procuring another to solicit employment for him in such claim, or who shall by himself

or another seek or obtain such employment, by giving directly or indirectly to the person from whom such employment is sought money or other thing of value, or who shall directly or indirectly, pay the debts or liabilities of the person from whom such employment is sought, or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought, before such employment, whether the same be done directly by him or through another"; third, immediately following the portion of the section imposing a penalty, the words are added, "provided that the penalties hereinbefore prescribed shall apply not only to attorneys at law, but to any other persons who may be guilty of any of the things set forth in the foregoing provisions of this Act." Attention in this particular is called to the fact that plaintiff in error is not charged with violating that part of the amendatory statute which reads, "or shall wilfully instigate, maintain, excite, prosecute or encourage the presentation of any claim in which such person has no interest, for his own profit or with the intent to distress or harass the person against whom such claim is brought or prosecuted." We believe that that part of the amendment would be within the police power of the State, and in fact, in a very large degree, conforms to the common law definition of barratry, and we are not attacking that particular provision. Plaintiff in error is charged, however, with the violation of the following provisions of the amendatory statute and being the ones assailed by us because of conflict with the Fourteenth Amendment to the Constitution of the United States, to-wit: "or shall seek to obtain employment in any claim, to prosecute, defend, present or collect the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such claim, or who shall by himself or another seek to obtain such employment, by giving

directly or indirectly, to the person from whom such employment is sought, money or other thing of value, or who shall directly or indirectly pay the debts or liabilities of the person from whom such employment is sought, or who shall loan or promise to give, loan or otherwise grant money or valuable thing to the person from whom such employment is sought, before such employment, whether the same be done directly by him or through another," we contend that the above last cited provisions of the amendatory law are in conflict with the Fourteenth Amendment to the Constitution of the United States, for the reasons set forth in the specifications of error.

It will be observed that the amendment under consideration is very broad and comprehensive; it wipes out collecting agencies and indirectly prohibits the assignment of claims and debts, including also claims for personal injuries. It prevents all persons from engaging in the purchase of these debts and claims, prevents the owners of same from assigning them to such persons, and in fact denies the parties the right to pursue this character of business, or to acquire that species of property. It is a well-known fact that many collecting agencies make a business of collecting and soliciting from merchants and others what are considered bad debts.

It is so universally known that the court must take judicial notice of the fact that the commercial agencies of Dunn and Bradstreet not only conduct the business of reporting upon the financial condition of business men, but they pursue the further business of collecting agencies wherein they seek employment for the collecting of claims from merchants throughout the United States. This barratry statute is broad enough in its terms to prohibit all business of this character. We might multiply illustrations but the

above is sufficient to call attention to the pernicious effect of the Act in question. This court, in the case of *Adams vs. Tanner*, 244 U. S., 595, said:

"The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinions. It will suffice to quote from a few."

This is immediately followed by citing with approval, among many other cases, the case of *Allgeyer vs. Louisiana*, 165, U. S., 578, 589; 41 L. Ed., 832. We will content ourselves by resting upon the *Tanner* and the *Allgeyer* cases with the decisions cited in them. It will be observed that the Court of Criminal Appeals of Texas, in its original opinion, asserted, "as to that matter the common law in effect forbade the sale of any choses in action. Our statute changes the common law in that respect (Article 583, Revised Statutes), and made them assignable * * * the Legislature would have the power to make all such claims unassignable, and these older laws would not control the effect of this amendment, but would control and modify them." (Printed Record, p. 20). This premise of the court was untenable and of course the whole argument of that court based upon said premise was likewise erroneous.

That this position of the court was erroneous we demonstrated in our argument upon the motion for rehearing, which is set forth in the printed record, pages 25 to 36. The court was forced to recede from that position and in fact in its opinion in overruling the motion for rehearing the court said, "particular stress and a great many authorities are cited in this motion and brief herein, contending, in effect, that where it was stated in the original opinion that the common law, in effect, forbade the sale of any chose in action, and that our statute (Article 583, Revised Statutes) change the common law so as to make them assignable, is not correct, relator claiming and citing many

authorities to the effect that either at common law, as in later years declared, and particularly in equity, all choses in action were assignable. Perhaps the said statement in the court's opinion may have been too broad, but whether the statement therein was correct or relator's contention is correct, did not and could not materially effect the conclusions reached in the original opinion. So that it is unnecessary now to further state or discuss that question. It might be conceded, for the sake of argument, that relator's contention is correct and the statement of the court is incorrect. The same result from the authorities would be reached." (Printed record, pp. 41-42).

The Court of Criminal Appeals in its opinion on the motion for rehearing made the same mistake as to the law which was made in the majority opinion of the court in the case of *Wiseman vs. Tanner* (221 Fed., 695), the fallacy in that opinion was exposed by the dissenting opinion of Judge Cushman (221 Fed., 704). That case reached this court, being the case of *Adams vs. Tanner* herein cited *supra*. This court coincided with the dissenting views of Judge Cushman and held, as Judge Cushman contended, that the statute of the State of Washington was unconstitutional and void, as being in conflict with the Fourteenth Amendment to the Constitution of the United States. We insist and respectfully present that the principles announced in the *Allgeyer* and the *Tanner* cases demonstrate the unconstitutionality of the statute which we assail in this proceeding. We further insist that the sole purpose and object of this amendatory statute was to incorporate in Article 421 of the Penal Code of the State of Texas the matters complained of in this brief as being in conflict with the Fourteenth Amendment to the Constitution of the United States; that that was the sole purpose of the amendment is manifest, not only from the phraseology of the Act, but such more clearly appears from the caption and the emer-

gency clause of the Act.. That being true, the provisions of this Act are not divisible in that the unconstitutional part may be separated from the constitutional portions of the Act. If the portion of the amendatory Act challenged by us in this proceeding should be held to be unconstitutional by this court, the remainder of the Act would be, both in words and legal effect, but a duplication of Article 421 of the Penal Code prior to the passage of this amendment. From this it would seem to follow that if our contention is sustained, the whole of the amendatory Act under consideration must fall.

We, therefore, respectfully pray that the court will reverse the judgment of the Court of Criminal Appeals of the State of Texas, and further, that this court will order the discharge of the plaintiff in error from his illegal confinement and restraint.

R. H. WARD,
Attorney for Frank P. McCloskey,
Plaintiff in Error.

SUBJECT INDEX.

SUBJECT.	PAGE.
I. Statement of the case.....	1-3
II. The Texas statute involved herein is a reasonable regulation of the subject and as such is valid.....	3-6
III. The Legislature, in the exercise of its power to protect and promote the public welfare, properly prohibited the practices dealt with in the statute.....	6-16

LIST OF CASES.

Adams vs. Tanner, 244 U. S., 590.....	5
Austin vs. Tennessee, 179 U. S., 343.....	6
Blackstone, Volume 4, page 125.....	10
Booth vs. Illinois, 184 U. S., 425.....	6
Bouvier (Rawles' Third Edition).....	11
Brazell vs. Michigan, 241 U. S., 340, 343.....	5, 10
Brown vs. Binn, 28 Pac., 11.....	15
Constitution of Texas, Sec. 29, Art. 16.....	3
Constitution of Texas, Sec. 13, Art. 1.....	3
Dalnus vs. Sears, 13 Ore., 47.....	15
Ellis vs. Frawley, 161 N. W., 364.....	11
Ford vs. Munroe, 144 S. W., 349.....	9
Huber vs. Johnson, 86 Minn., 74.....	15
Ingersoll vs. Coal Creek Coal Co., 98 S. W., 178, 9 L. R. A. (N. S.), 282.....	15
Holland vs. Sheehan, 122 N. W., 1, 23 L. R. A. (N. S.), 510..	14
Langdon vs. Collin, 60 L. R. A., 429.....	15
McCloskey vs. San Antonio Traction Co., 192 S. W., 1116...	10
McLean vs. Arkansas, 211 U. S., 539, 547, 548.....	6
Murphy vs. California, 225 U. S., 623.....	6, 7
Otis vs. Parker, 187 U. S., 606.....	6
Powell vs. Pennsylvania, 127 U. S., 678.....	6
Rast vs. Van Deman & Lewis Co., 240 U. S., 342, 368.....	6
Traer vs. Clews, 115 U. S., 528, 539.....	11



No. 958.

In the Supreme Court of the United States

OCTOBER TERM, 1917.

FRANK P. McCLOSKEY, PLAINTIFF IN ERROR,

VS.

JOHN W. TOBIN, SHERIFF, BEXAR COUNTY, TEXAS,

DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The "Statement of the Case" made in the brief for plaintiff in error is substantially correct. However, we desire to call attention to the fact that while the statute involved denounces, disjunctively, a series of acts, the exact provision which plaintiff in error is charged with violating is the following:

(WHOSOEVER, lawyer or layman, shall) * * * "BY PERSONAL SOLICITATION OF SUCH EMPLOYMENT" * * * "SEEK TO OBTAIN EMPLOYMENT IN ANY CLAIM, TO PROSECUTE, DEFEND, PRESENT OR COLLECT THE SAME" * * * "shall upon conviction be punished by fine in any sum not to exceed five hundred (\$500) dollars," etc., etc.

Plaintiff in error is not charged under any other provision of the statute. The charging part of the complaint shows, *first*, that one B. Richardson had a claim, or cause of action, for damages against one Gus Rote, which arose on or about the 23d day of September, 1917, and "that thereafter, on the 25th day of September, A. D. 1917, Frank P. McCloskey, who was not then and there an attorney at law, having learned of the collision of said two automobiles as aforesaid, and of the injuries received thereby

by said B. Richardson, and of the existence of the claim and cause of action arising thereby in favor of said B. Richardson against the said Gus Rote, for damages on account of the personal injuries aforesaid received by him, the said B. Richardson, as aforesaid, he, the said Frank P. McCloskey, in the county of Bexar and State of Texas, on the 25th day of September, A. D. 1917, did see the said B. Richardson, and did then and there seek to obtain employment from the said B. Richardson, in said claim aforesaid, against the said Rote, to prosecute, and to present and collect the same by means of personal solicitation of such employment from and by the said B. Richardson, aforesaid, contrary to the statute in such case made and provided, and against the peace and dignity of the State." (Printed record, page 5.) The second count in the complaint charges the same character of offense with respect to a claim for labor done and material furnished by Neal & Son. (Printed record, page 5.) The information, based upon the complaint, charges the offense in the same language as the complaint. (Printed record, page 6.)

It is agreed that the material allegations of the complaint and information are true. (Printed record, page 15.)

Article 421 of the Penal Code of Texas (as enacted in 1876) is set forth in full on pages 12 and 13 of the brief for plaintiff in error. As originally enacted, that statute made it an offense for any LAWYER to do what plaintiff in error (a layman) has done, for, says the statute:

"If any attorney at law shall seek or obtain employment in any suit or case at law, or in equity, to prosecute or defend the same, by means of personal solicitation of such employment * * * shall be punished by a fine in any sum not to exceed five hundred dollars," etc., etc.

Notwithstanding said statute (as it existed up to the time of the passage of the act in question), a custom and practice grew up in the State, through the activity of men who were not lawyers, which resulted in widespread evils of such magnitude and nature as "to prevent amicable and just settlement of claims and dis-

putes between parties and (to) interfere with the due administration of justice in the courts," according to the declaration of the Legislature embodied in the emergency clause of the new statute. (Printed record, page 18, "Sec. 2.") The plaintiff in error was a substantial contributor to this practice to such an extent that a party interested brought a suit against him to restrain his activities upon the assumption that the law, as it then existed, denounced the same. In *that* case, for the first time, the Court of Civil Appeals announced that the statute did not cover the conduct of plaintiff in error, and thereafter, and apparently largely because of this decision, the Legislature so amended Article 421 as to define the offense with which plaintiff in error is here charged.

These things are shown in the opinion of the Court of Criminal Appeals. (See printed record, pages 21-22.)

Section 29 of Article 16 of the Constitution of Texas (adopted in 1876) commands that—

"The Legislature shall provide by law for defining and punishing barratry."

Section 13 of Article 1 of the Constitution of Texas (adopted in 1876) announces the public policy of the State to be that of encouragement of "arbitration" of "differences" in the following language:

"It shall be the duty of the Legislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial."

BRIEF OF ARGUMENT.

The basis of the attack upon the statute is the assumption that it PROHIBITS a BUSINESS or OCCUPATION not inherently evil. The argument is thus summarized on page 17 of the brief for plaintiff in error:

"It will be observed that the amendment under consideration is very broad and comprehensive; it wipes out collection agencies

and indirectly prohibits the assignment of claims and debts, including also claims for personal injuries. It prevents all persons from engaging in the purchase of these debts and claims, prevents the owners of same from assigning them to such persons, and in fact denies the parties the right to pursue this character of business, or to acquire this species of property."

This premise, we think, utterly lacks foundation. Granting, *arguendo*, that the operation of a "collection agency" is a "business" which cannot be prohibited; granting further that the "assignment of claims and debts, including claims for personal injuries," cannot be prohibited; granting, *arguendo*, that persons cannot be prohibited from engaging in the business "of purchasing these debts and claims," the fact remains, nevertheless, that the statute as a whole,—and certainly that part of it here involved,—carries no such prohibition. Instead of being a PROHIBITION of these things, in reality it is but a

REGULATION.

For the statute leaves the owner of a claim free to assign the same to any person he may find desirous of purchasing; it leaves the operator of a "collection agency" free to carry on his business and to advertise the same in all proper and reasonable ways; it leaves such business as that carried on by Dun's or Bradstreet's untouched, so long as they refrain from "personal solicitation," etc. The separable provision of the statute under which plaintiff in error is accused,—and we think he cannot in this case complain of any other,—leaves him, and others, free to collect claims, free to purchase the same, and free to advertise in all proper ways his willingness and facility to collect or to buy or to prosecute, and simply prohibits him, and others in like circumstances, from going out and, through PERSONAL SOLICITATION, seeking "to obtain employment in any claim, to prosecute, defend, present or collect the same,"—and this, we submit, is a proper and reasonable regulation of the subject matter. Assuming that the "business" or "occupation" dealt with in this statute is entitled to the

same degree of protection as that dealt with in the Washington statute considered by this court in *Adams vs. Tanner*, 244 U. S., 590, still it is clear that the manner of dealing with the subject matter by the two acts is radically different in vital respects. The Washington statute absolutely prohibited "any employment agent" or his representative or any other person from demanding or receiving from any other person any remuneration or fee whatsoever for furnishing him or her with employment or with information leading thereto, while the Texas statute leaves the collecting agent, or his representative, free to demand or receive such compensation as may be agreed upon for his services, and leaves all persons desiring to purchase claims free to do so and upon such terms as may be agreed upon,—the inhibition being against the "personal solicitation" of such employment. The readiness to accept such "employment" may even be generally advertised in every conceivable way, except that "personal solicitation" may not be used with respect to any particular claim or claims. All persons are left free to take their claims to plaintiff in error, or any other person, for collection and to pay therefor. The Texas statute is closely analogous to the one upheld by this court in *Brazee vs. Michigan*, 241 U. S., 340, 343. Section 6 of the statute there considered provided that—

"No employment agent or agency shall send an applicant for employment to an employer WHO HAS NOT APPLIED TO SUCH AGENT OR AGENCY FOR HELP," etc.

And it was urged in *that* case that Section 6 violated the Fourteenth Amendment (page 344). The court defined the conduct denounced by Section 6 as being "plainly mischievous" and upheld the statute as a reasonable regulation. The Michigan statute (considered in *Brazee vs. Michigan*) prohibited the employment agent from intermeddling with the business of the employer who had not invited his assistance; the Texas statute simply prohibits the "collecting agent" from personally soliciting employment from another without invitation. The Michigan statute left the em-

ployment agent free to furnish employes when sought by the employer; the Texas statute leaves the collecting agent free to accept service, and remuneration therefor, when sought by a principal or employer. We submit *Brazee vs. Michigan*, supra, as decisive of the proposition that the Texas statute is a reasonable regulation of the subject matter.

But, lest we should be mistaken in this, we submit that the statute, at least in so far as it is involved here, is valid.

AS A PROHIBITION.

The court has frequently held that "a statute enacted to promote health, safety, morals or the public welfare may be valid, although it will compel discontinuance of existing businesses in whole or in part." Thus: The manufacture and sale of oleomargarine—*Powell vs. Pennsylvania*, 127 U. S., 678; sale of cigarettes—*Austin vs. Tennessee*, 179 U. S., 343; sale of futures in grain or other commodities—*Booth vs. Illinois*, 184 U. S., 425; sale of stocks on margin—*Otis vs. Parker*, 187 U. S., 606; keeping billiard halls—*Murphy vs. California*, 225 U. S., 623; sale of trading stamps—*Rast vs. Van Deman & Lewis Co.*, 240 U. S., 342, 368.

In *Booth vs. Illinois*, 184 U. S., 429 (quoted with approval in *Adams vs. Tanner*, 244 U. S., 595), this court said:

"If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

Again, in *McLean vs. Arkansas*, 211 U. S., 539, 547, 548, it is said:

"The Legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. * * * If there existed a condition of affairs concerning which the Legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained."

In *Murphy vs. California*, 225 U. S., 623, 628, it is said of the Fourteenth Amendment:

"Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not, be harmful to the public, according to local conditions, or the manner in which they are conducted."

Now it is clear that the act in question was passed with strict view of local conditions. In the emergency clause of this act,—Section 2, printed record, page 18,—the Legislature declared that the "evils sought to be remedied by this act" are such "as to prevent amicable and just settlements of claims and disputes between parties and (to) interfere with the due administration of justice in the courts." If this declaration be even measurably true, certainly the suppression of the evils was imperatively demanded by the public welfare. That there was ample basis in fact for the declaration is shown by the record here. Of this matter the Court of Criminal Appeals in this case said:

"Shortly prior to February, 1917, the San Antonio Traction Company brought a suit for injunction against relator, setting up in detail a terrific state of facts which he had committed, which are stated by the San Antonio Court of Civil Appeals in the opinion, 192 S. W. Rep., 1117, and of which the opinion says: 'The evidence introduced at the hearing

is fairly summarized by the trial judge in his terse, lucid, and able opinion, as follows: The testimony offered by the plaintiff tends strongly to establish the material allegations in the plaintiff's petition. It appears that about 60 per cent of all the claims presented against the plaintiff are presented by the defendant. A large number of witnesses testified that they had received slight injuries, or been on cars which were derailed, in which they received practically no injuries; that they were not acquainted with the defendant or his agents, and that almost immediately after such accidents the defendant or his agent approached them and solicited his employment by the claimants, urging them to present claims against the plaintiff for large damages, and that, if they would give him the claims to handle he could obtain large sums of money for them, and urging them to exaggerate their injuries, to remain in bed as long as they could endure it, and when they went out insisted upon their using crutches when not necessary, and by various means trying to induce them to assist him in obtaining large sums of money from the plaintiffs, in many instances paying them a considerable sum of money in advance for the purpose of securing contracts of employment from them, and in some instances calling in a doctor to advise the claimants that they were seriously and permanently injured, when in truth and in fact they were only slightly injured, or not injured at all; that a great number of suits for hundreds of thousands of dollars were filed by attorneys employed by the defendant on claims presented by the defendant, and that the defendant is still continuing said business, one claim having been presented during the hearing of this application, and that he proposed to so continue the same. Although the defendant and his principal agent and assistant were present in court during the hearing of this application and heard the testimony of these witnesses, in which they were charged with the things hereinabove stated, they did not take the stand to deny or refute the testimony of these witnesses.' The district court enjoined him, from which he appealed. The Court of Civil Appeals, in an opinion rendered February 7, 1917, held that said Article 421 as it then was restricted the offense of barratry to attorneys at law, saying: 'It is clear that only an attorney at law is for-

bidden to solicit employment in any suit himself or by an agent. Why the Legislature left it lawful for a layman to do — impunity those things, which it made unlawful to be done by an attorney at law, we are not called upon to explain. It may be the Legislature did not anticipate that a layman would develop a large and lucrative business of speculation and peculation, as Judge Gould expressed it in the brief in the Bentinck case, dealing with the accident or transportation companies. We find that there is not — force in this State any common law nor statutory law that makes it unlawful for a person, who is not — licensed attorney, to solicit employment as agent to adjust claims, nor to solicit claimants to present claims or sue upon them.’

“Thereupon the Legislature passed said amendment to cover this very omission, enacting ‘if any person,’ etc., and further enacting therein: ‘That the penalties hereinbefore prescribed shall apply not only to attorneys at law, but to any person who may be guilty of any of the things set forth in the foregoing provisions of this act.’ The caption also makes it clear that all others, as well as attorneys, were embraced.” (Printed record, pages 21-22.)

The existence of the evils of barratry, champerty and maintenance in this State, and the need for legislation suppressing the same, is evidenced by the facts shown in various cases decided by the appellate courts of Texas. In *Ford et al. vs. Monroe et al.*, 144 S. W., 349, the Court of Civil Appeals had before it a state of facts showing that certain attorneys had employed persons who were not attorneys personally to solicit employment for them in connection with the administration of a certain estate. The court held the arrangement to be void.

That barratry, champerty and maintenance, in all their varied forms, possess inherently characteristics of such viciousness as to warrant the complete suppression of the practice in aid of the public welfare is evidenced by the constitutional and statutory provisions of many of the States, to say nothing of the prohibitions of the common law. The Texas Constitution, from the earliest days of the State, has commanded the Legislature to sup-

press the evils. Conversely, it has embodied the public policy of discouraging litigiousness encouraging the settlement of disputes out of court. (See Section 13, Article 1.) Immediately after the adoption of the Constitution of 1876,—pursuant to Section 29, Article 16 thereof, commanding the Legislature to “provide by law for defining and punishing barratry,”—Article 421 of the Penal Code was enacted, which, among other things, made it an offense for a lawyer to “seek or obtain employment in any suit or case at law, or in equity, to prosecute or defend the same, by means of personal solicitation of such employment.” This statute was generally recognized by succeeding Legislatures as being proper and as being demanded by the public welfare, and its provisions were from time to time strengthened. After the decision of the Court of Civil Appeals in *McCloskey vs. San Antonio Traction Co.*, 192 S. W., 1116, wherein it was announced that the statute did not cover like practices committed by laymen, the Legislature amended the article so as to make it apply to “all persons,” whether attorneys or not. And because the statute is now made to apply to “all persons,” instead of lawyers alone, plaintiff in error claims that it constitutes class legislation!

By the provision of the statute under which plaintiff in error is accused, as stated before, all persons are prohibited from seeking “to obtain employment in any claim to prosecute, defend, present or collect the same by means of personal solicitation of such employment.” As shown before, a closely analogous provision of a Michigan statute was upheld by this court in *Brazee vs. Michigan*, 241 U. S., 340, 343,—and that provision of the Michigan statute related to an occupation recognized as highly useful. But we have here a so-called “occupation,” or “business,” with respect to which at least a large part of the civilized world has always been in accord upon its inherent vice, whether carried on by lawyers or by others. Persons who indulge in barratry are described in *Blackstone* (Vol. 4, page 125) as “those pests of civil society that are perpetually endeavoring to disturb the repose of

their neighbors and officiously interfering in other men's quarrels," and barratry is elsewhere described as "the trafficking and merchandising in quarrels; the huckstering in litigious discord." (Bouvier, Rawles' Third Edition.) In *Traer vs. Clews*, 115 U. S., 528, 539, this court said: "The rule is that assignment of a mere right to file a bill in equity for fraud committed upon the assignor will be void as contrary to public policy and savoring of maintenance"; if the mere assignment itself is against public policy, what can be said in favor of the "personal solicitation" thereof by the assignee?

The courts of the various States have generally disapproved of the practice of personal solicitation of employment in the collection of claims, etc., whether indulged in by attorneys or laymen. Some of the cases in which the question has arisen,—in varying forms,—will now be referred to.

The case of *Ellis vs. Frawley*, 161 N. W., 364, involved an action for accounting and settlement of the affairs of a joint business venture or partnership; the plaintiff was a lawyer residing at Black River Falls; the defendants were lawyers practicing at Eau Claire. The plaintiffs and defendants made an agreement under which they were to act jointly as attorneys in prosecuting claims for all persons who might employ them with reference to causes of action against a certain power company arising out of a flood. The trial court found as a fact:

"That plaintiff at the request of the defendants rendered services to the defendants in inducing flood sufferers to retain the defendants to prosecute their claims and in procuring assignments of such claims; that he continued to render services to the defendants during the years 1912 and 1913 with reference to the losses sustained and claims made by such flood sufferers which defendants were seeking to recover through actions brought by them acting as attorneys for such flood sufferers."

The Supreme Court of Wisconsin held the contract to be void as against public policy, saying:

"The court will not allow itself to be used as the means of car-

rying into effect a contract which is essentially contrary to morality or to public policy, even though no objection be made by the parties. *Wight vs. Rindskopf*, 43 Wis., 344. It seems that the arrangement was clearly against public policy.

"The mere intermeddler, the officious stirrer up of litigation in which he has no interest save the possibility of a commission or a fee, has been condemned by courts and legislators since the earliest times. This is so because the practice of the law is not a trade but a ministry.

"Chief Justice Ryan well said in his eloquent address before the graduating law class of the University of Wisconsin for 1873:

"The pursuit of the legal profession for the mere wages of life is a mistake alike of the means and the end. It is a total failure of appreciation of the character of the profession. This is the true ambition of a lawyer: To obey God in the service of society; to fulfill His law in the order of society; to promote His order in the subordination of society to its own law, adopted under His authority; to minister to His justice, by the nearest approach to it, under the municipal law, which human intelligence and conscience can accomplish. To serve man, by diligent study and true counsel of the municipal law; to aid in solving the questions and guiding the business of society, according to the law; to fulfill his allotted part in protecting society and its members against wrong, in enforcing all rights and redressing all wrongs; and to answer, before God and man, according to the scope of his office and duty for the true and just administration of the municipal law.'

"The ideal here expressed is high; it is by no means always lived up to, but it is none the less the ideal toward which the profession should ever strive. It is because the ideal is frequently lost sight of, because many lawyers practice their profession as if it were a mere business like the buying and selling of groceries, that the profession falls into disrepute. The great Chief Justice died before the evolution of the personal injury action and that degraded form of lawyer commonly known as the 'ambulance chaser'; what he would have said of them can better be imagined than described.

"The twenty-eighth canon of ethics adopted by the American Bar Association treats the subject as follows:

"*'Stirring up Litigation, Directly or Through Agents.—It is*

unprofessional for a lawyer to volunteer advice to bring a law suit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases into his office.

* * * A duty to the public and to the profession devolves upon every member of the bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.'

"This court in the past has taken an elevated view of the duties of an attorney in the practice of his profession, and we have no inclination to take any less elevated view now. *Wight vs. Rindskopf*, *supra*. The standard should be raised, rather than lowered, for the age in which we live is one which is much concerned with money and the things which money will bring. The fact that the lawyer must support himself by his professional labors, and that he receives his compensation from a purely private source, unquestionably has a tendency to commercialize his work and obscure even from his own mind the fact that his real client is Justice. To successfully combat this tendency, we must have lawyers who not only say, but really believe, that they are ministers of Justice, and not men hired by their clients to circumvent or outwit the law. We cannot have such lawyers if such contracts as this are to be approved.

"It is stated in respondent's brief that the claims secured by the aid of the plaintiff were all assigned to one person; that one action was commenced thereon, but that before trial a settlement was made for a sum somewhere between \$50,000 and \$60,000, out of which the defendants, by virtue of their contracts with the claimants, retained 40 per cent, or about \$22,000. These facts are not in evidence, but they may properly be assumed as true as against the party who asserts them. This then was the scheme to the consummation of which the plaintiff agreed to contribute; i. e., a scheme to get hold of all the claims possible, and in case

of success 40 per cent of the proceeds was to go to the lawyers and 60 per cent (probably after payment of costs) to the people whose property had been swept away.

"Attorneys are entitled to good pay, for their work is hard; but they are not entitled to fly the black flag of piracy. Such contracts as are here in question tend to make the lawyer forget his high duty as a minister of Justice and to convert him into a mere grubber for money in the muck-heaps of the world. They also tend to make the name of a lawyer a proverb and a byword among laymen.

"A number of courts have condemned contracts of this nature. 2 Thornton on Attorneys, Sec. 436; Gammons vs. Johnson, 76 Minn., 76, 78 N. W., 1037; Holland vs. Sheehan, 108 Minn., 1, 122 N. W., 1, 23 L. R. A. (N. S.), 510, 17 Ann. Cas., c. 87; Ingersoll vs. Coal Co., 117 Tenn., 263, 98 S. W., 179, 9 L. R. A., (N. S.), 282, 119 Am. St. Rep., 1003, 10 Ann. Cas., 829; Mequire vs. Corvine, 101 U. S., 108, 25 L. Ed., 899; Ford vs. Munroe (Texas Civ. App.) 144 S. W., 349.

"In most of the cases cited the party soliciting the business was a layman, but it is not perceived how this fact affects the principle involved. If it is against public policy for a layman to foment litigation and make a claim bureau of himself under contract with a law firm, it would seem to be fully as much so for a lawyer to do the same thing."

In Holland vs. Sheehan, 122 N. W., 1, 23 L. R. A. (N. S.), 510, the Supreme Court of Minnesota held to be void a contract between a layman and a lawyer by which the former undertook and agreed, in consideration of a division of the fees received by the latter, to hunt up and bring to the attorney persons having causes of action against railroad companies and others for personal injuries. In the course of the opinion the court said:

"The conduct by a layman in stirring up litigation, searching out persons who have received some injury to their person or property, and inducing them to entrust their cause to the solicitor, or an attorney of his selection, on a contingent fee basis, tends to disturb confidence in the administration of justice and to undermine that sense of security for individual rights which every citizen has the right to feel, and is as obnoxious to sound public senti-

ment as when champerty was a crime at common law, is too obvious to require extended discussion. As remarked by Judge Mitchell in *Gammons vs. Johnson*, 76 Minn., 81, 78 N. W., 1035: "The general purpose of the law against champerty and maintenance and barratry was to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. All contracts or practices which necessarily and manifestly tend to produce these results ought still to be held void on grounds of public policy." It becomes all the more odious when participated in by a lawyer and a layman; the latter agreeing to "find the cases" and the former to conduct them through the courts. In such cases both are equally guilty and neither should be permitted, in a court of justice, successfully to assert alleged rights accruing from the iniquitous agreement. *Huber vs. Johnson*, 68 Minn., 76, 64 Am. St. Rep., 456, 70 N. W., 806; *Gammons vs. Johnson*, 69 Minn., 488, 72 N. W., 563; *Gammons vs. Gulbranson*, 78 Minn., 21, 80 N. W., 779."

In *Langdon vs. Conlin*, 60 L. R. A., 429, the Supreme Court of Nebraska considers a contract between an attorney and one who was not an attorney by which the latter agreed to procure the employment of the former by third persons for prosecution of suits in courts of record, etc., and held such agreement to be against public policy and void.

See, also, *Ingersoll vs. Coal Creek Coal Company*, 98 S. W., 178, 9 L. R. A. (N. S.), 282; *Brown vs. Blinn*, 28 Pac., 11; *Dalins vs. Sears*, 13 Ore., 47; *Huber vs. Johnson*, 68 Minn., 74, 70 N. W., 806.

The views of the courts and authors referred to certainly demonstrate that there may be a substantial relation between the public welfare and the suppression of the evils attendant upon the practices reached by the Texas statute. The local conditions in Texas with which the Legislature was dealing were real conditions, and their existence is not challenged, and cannot be challenged, in the record of this case. The Legislature, upon substantial evidence, found that the particular practices dealt with were inherently

vicious and harmful. In this conclusion, the courts of other States, and of the United States, it seems to us, agree. We think that the Legislature might well have gone much further than it did go in an effort to stamp out effectually all barratrous or champertous practices and still have been within its legitimate powers, in view of the decisions from this court in the cases cited above. We are constrained to believe that the Legislature could have, in terms, prohibited the entire business in all of its phases in which plaintiff in error is shown to be engaged; but instead of doing so, instead of exhausting its power over the subject, it was content to regulate the business of collecting claims, etc., by prohibiting certain particular evil practices shown to exist in connection therewith. We repeat that there is nothing in the statute to prohibit McCloskey, or others, from collecting claims, or representing other persons for hire, or from purchasing causes of action; nor is there anything therein to prohibit the owners of claims from hiring or employing McCloskey, or any other person, to collect the same, or to prohibit the owners from assigning such property; there is not even anything in the statute to prevent McCloskey, or others, from advertising their so-called business in any proper way,—he, and they, are simply prohibited from going about intermeddling in the controversies of third parties by personally soliciting employment in connection with particular claims. The statute, we believe, is entirely free of the objections to the Washington statute discussed in *Adams vs. Tanner*, 244 U. S., 590, and is much more reasonable,—in view of the nature of the subject matter,—than the provision of the Michigan statute upheld in *Brazee vs. Michigan*, 241 U. S., 340, 343.

We respectfully submit that the judgment of the Court of Criminal Appeals of Texas should be, in all things, affirmed.

B. F. LOONEY,

Attorney General of Texas.

Luther Nickels LUTHER NICKELS,

Assistant Attorney General of Texas.

Attorneys for Defendant in Error.